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85-2169

Supreme Court, U.S.
FILED
JUL 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, individually and in their official capacities,

Petitioners

v.

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

July, 1986

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QUESTIONS PRESENTED

1. Does a claim by an "Arab" who is admittedly Caucasian, i.e., racially white, when he is presumably claiming other Caucasians or whites were improperly favored over him, consitute an allowable racial or any other allowable claim under 42 U.S.C. § 1981?

2. In Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), the United States Court of Appeals for the Third Circuit concluded that the ruling of this Court in Wilson v. Garcia, ____ U.S.____, 105 S.Ct. 1938 (1985), mandated that Pennsylvania's two-year statute of limitations for personal injuries be applied to actions brought under 42 U.S.C. § 1981.

The question presented is:

Did the court of appeals err in applying Chevron Oil Co. v. Huson and Wilson v. Garcia when it refused to apply

the two-year statute retroactively and instead held that its decision in Goodman would not be applied retroactively to § 1981 causes of action accruing, it would appear, after 1977 and for some period after.

3. Are individual members of a college tenure committee subject to liability under 42 U.S.C. § 1981, when the function of the committee is only to make recommendations and the committee and its members do not have decision-making capacity and authority, such capacity and authority being in the Board of Trustees?

4. Was the decision of the court of appeals that the district court should reconsider the discovery rulings appealed in light of its (the Circuit's) recent decision in Equal Employment Opportunity Commission v. Franklin and Marshall College in error in that it does not

protect the secrecy and confidentiality of the Tenure Committee proceedings?

[Note: Petitioners reserve the right to argue Question 5 in the event certiorari is granted on the above questions, but do not include Question 5 among the reasons for the grant of certiorari].

5. Is a prima facie 42 U.S.C. § 1981 case present, in a college denial of tenure context, when, inter alia, no one in the plaintiff's department was recommended for or granted tenure until two years after the tenure decision as to plaintiff and that person was plaintiff's wife?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the respondent, Majid Ghaidan Al-Khazraji a/k/a Majid Al-Khazraji Allan, and the petitioners, Saint Francis College, John Willoughby, Gervase Cain, Kirk Weixel, John Coleman, Rodrique Labrie, Albert Zanzuccki, Adrian Baylock, Marian Kirsch and David McMahon, individually and in their official capacities.

Petitioner, Saint Francis College, has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioners, Saint Francis College, John Willoughby, Gervase Cain, Kirk Weixel, John Coleman, Rodrique Labrie, Albert Zanzuccki, Adrian Baylock, Marian Kirsch and David McMahon, individually and in their official capacities, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 3. 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 784 F.2d 505 and is present in the appendix hereto, p. 1a, infra.

The Memorandum Opinion of the United States Court for the Western District of

Pennsylvania (Mencer, D.J.) has not been reported. It is present in the appendix hereto, p. 34a, infra.

The Opinion of the United States Court for the Western District of Pennsylvania (Ziegler, D.J.) is reported at 523 F.Supp. 386. It is present in the appendix hereto, p. 46a, infra.

JURISDICTION

The United States Court for the Western District of Pennsylvania had jurisdiction of the claim under 42 U.S.C. § 1981, except to the extent that issues herein may operate to remove jurisdiction. On March 12, 1985, the District Court granted petitioners' motion for summary judgment in favor of each of the petitioners. See p. 34a, infra.

On respondent's appeal, the United States Court of Appeals for the Third Circuit on March 3, 1986, entered a

judgment and an opinion reversing the judgment below and remanding for further proceedings consistent with the Opinion of the Court. See p. 1a, infra.

The Court of Appeals denied a timely petition for rehearing on April 4, 1986. See p. 80a, infra.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

The named petitioners in this petition are Saint Francis College, John Willoughby, Gervase Cain, Kirk Weixel, John Coleman, Rodrique Labrie, Albert Zanzuccki, Adrian Baylock, Marian Kirsch and David McMahon, individually and in their official capacities. The nine named natural persons were members of the Saint Francis College Committee on Tenure at the time of the Committee's negative vote on the tenure application of respondent, a former faculty member at petitioner college, in February of 1978. Respondent's 42 U.S.C. § 1981 claim of discrimination in denying him tenure is the subject of this petition.

Three complaints were filed on behalf of respondent, Majid G. Al-Khazraji, in the United States Court for the Western District of Pennsylvania.

The first was filed pro se on October

30, 1980, against petitioner, Saint Francis College, only. The alleged basis for relief in that complaint is a violation of Title VII of the Civil Rights Act of 1964, as amended.[1] (7a)

The second complaint, labeled "Amended Complaint," was filed by prior counsel for respondent on November 7, 1980, against petitioner, Saint Francis College, and nine members of its faculty and administration (the nine named petitioners) individually and in their official capacities. This Amended Complaint [hereinafter sometimes Amended Complaint or Amended Complaint I] is in three counts. Count I charges a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.

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[1]References to the record, e.g., (7a), are to pages in the Appendix filed in the United States Court of Appeals for the Third Circuit. References to (Appendix __a) are to the Appendix to this Petition.

§ 2000e et seq. Count II charges a violation of 42 U.S.C. §§ 1985(3) and 1986. While Paragraph 2 of Amended Complaint I states that this action arises under 42 U.S.C. §§ 1981, 1983, 1985(3), and 2000e, Count II in the Claims for Relief portion of Amended Complaint I restricts itself to 42 U.S.C. §§ 1985(3) and 1986. Count III raises certain state claims, which are alleged to be pendent to the federal claims. (11a)

The third complaint, labeled "Amendment to Civil Action Complaint No. 80-1550 filed at the United States District Court for the Western District of Pennsylvania," was filed pro se on November 10, 1980, against defendant, Saint Francis College, and eight of the nine persons named in the second complaint. In this third complaint [hereinafter sometimes referred to as

Amended Complaint II], the alleged basis for relief is a violation of Title VII of the Civil Rights Act of 1964, as amended.

Pre-trial motions in essence to dismiss were filed. Portions were granted and portions were denied by District Judge Ziegler. Dismissal of the 42 U.S.C. § 1981 claim was denied. Al-Khazraji v. Saint Francis College, 523 F.Supp. 386 (W.D.Pa. 1981). District Judge Ziegler, in a pre-Wilson v. Garcia, _____ U.S. _____, 105 S.Ct. 1938 (1985), situation, following Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978), applied a six-year statute of limitations. As to the underlying elements of a § 1981 claim, Judge Ziegler, in essence, read the three complaints filed by respondent together. Even though Amended Complaint I, the only complaint which mentioned a § 1981 claim and the one which he treated as the

operative amendment, did not mention race, (Appendix 70a- 71a and 73a) Judge Ziegler concluded, inter alia, that respondent was making a claim that he was denied tenure because he is an "Arabian born in Iraq," (Appendix 71a) and that such a claim may serve as the basis for a civil rights action under 42 U.S.C. § 1981.

The attorney-prepared complaint (Amended Complaint I), the one treated by Judge Ziegler as the operative amendment, charged discrimination on the basis of national origin and religion. As previously stated, it did not mention race. None of the three complaints contained an allegation of discrimination because of color. In the three federal court complaints (7a, 11a, 26a) plaintiff twice claimed "Muslim, Arabian, and Iraqi in national origin," once claimed "national origin and religion," and also

claimed "national origin (Iraq), religion (Muslim), and/or race (Arabian)."

Thereafter, District Judge Mencer, to whom the case had been re-assigned, denied certain requests by respondent for discovery of, inter alia, the vote of individual members of the Tenure Committee and the reasons for each member's vote.

Petitioners thereafter moved for summary judgment. This motion was granted and judgment was entered in favor of each of the respondents. As to the § 1981 aspect, District Judge Mencer stated, in part (Appendix 37a-39a):

> Additionally, plaintiff does not qualify as a member of a protected minority under § 1981. Section 1981 is generally considered to apply only to racial and alienage discrimination, 3 A. Larson, Employment Discrimination, § 71.00 et seq.; 4 A. Larson, Employment Discrimination, § 94.00 et seq. The Amended Complaint alleges discrimination

on the basis of national origin and religion, and not on the basis of race or alienage. Accordingly, the alleged acts of discrimintion here are not within the scope of 42 U.S.C. § 1981.

Even if the Amended Complaint were to be read as making a racial claim under § 1981, plaintiff factually does not qualify as a protected minority member. At his deposition plaintiff stated:

> Q. Are you also taking the position that you were denied tenure because of your race?
>
> A. Yes.
>
> Q. What is your race?
>
> A. Caucasian but I was a different branch of the Caucasian race than you are. I am Caucasian but a different branch. I am claiming the national origin which is closer related to race and religion.

Plaintiff is claiming that he was discriminated against because of his national origin, Iraq, his ancestry, Arabian, and his religious creed, Muslim. A claim of discrimination on the basis of being an Iraqi or Arab is not cognizable under § 1981. Ibrahim v. New York State

Department of Health, 581 F. Supp. 228 (E.D.N.Y. 1984).

> Accordingly, we must conclude that plaintiff is unable to establish a prima facie § 1981 case.

As to the liability of the nine members of the Tenure Committee, Judge Mencer stated, inter alia (Appendix 41a-43a):

> . . . It should be noted that the function of the Tenure Committee, and its members in voting, under the Guidelines for Tenure, is to make recommendations, and the Committee and its members do not have decision-making capacity and authority. The Tenure Committee, and its members in voting, under the Guidelines for Tenure, are to render a qualitative judgment, which judgment here, as manifested in the vote of the Committee, was negative. The authority and power of the Board of Trustees, under the governing College documents, including the Guidelines for Tenure, was exercised to deny and withhold tenure. Thus, the individual defendants lack capacity to be sued and authority to be sued in either an individual or a representative or an official capacity, inasmuch, as previously stated, their

> function in the tenure process is merely to make a recommendation and they do not have decision-making capacity and/or authority. Furthermore, the Tenure Committee is not a legal entity or an entity subject to suit, and lacks capacity to be sued and authority to be sued, since the function of the Tenure Committee in the tenure process, under the Guidelines for Tenure, is merely to make a recommendation and it does not have decision-making capacity and/or authority. In view of the limited, non-decision-making role of the individual defendants in the tenure process, they are thus not subject to liability under any of the theories propounded by plaintiff.

On appeal, the judgment of the district court was reversed and the case was remanded for proceedings consistent with the opinion, Al-Khazraji v Saint Francis College, 784 F.2d 505 (3d Cir. 1986).

The United States Court of Appeals for the Third Circuit held that "ethnic Arabs may depend upon Section 1981 to remedy racial discrimination against

them." The Court concluded that "Congress's purpose [in enacting § 1981] was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive." [Footnote number omitted.] (Appendix 24 a) The Court added that, "Discrimination based on race seems, at a minimum, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens." (Appendix 25a) It concluded its discussion of this aspect of § 1981 liability by stating [Footnote is omitted.]:

> . . . However, where a plaintiff comes into federal court and claims that he has been discriminated against because of

> his race, we will not force him first to prove his pedigree. We are unwilling to assert that Arabs cannot be the victims of racial prejudice: "prejudice is as irrational as is the selection of groups against whom it is directed. It is thus a matter of practice or attitude in the community, it is a usage or image based on all the mistaken concepts of 'race.'" Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979).[17]
>
> Accordingly, Al-Khazraji should be allowed the opportunity to prove that the discrimination he alleges is racially motivated within the meaning of Section 1981. (Appendix 26a-27a)

As to the contention of respondents that the statute of limitations had run as to the § 1981 claim, the Third Circuit noted that it had concluded in Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), that the ruling of the Supreme Court in Wilson v. Garcia, _____ U.S. _____, 105 S.Ct. 1938 (1985), mandated that Pennsylvania's two-year statute of

limitations for personal injuries be applied to actions brought under § 1981. However, in applying Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), the Third Circuit refused to apply the two-year statute of limitations and instead held that its decision in Goodman would not be applied to § 1981 causes of action accruing, it would appear, after 1977 and for some period after.

As to liability of the individual petitioners under § 1981, viewing § 1981 as in the nature of a tort remedy, the Third Circuit concluded (Appendix 27a-28a):

> If individuals are personally involved in the discrimination against the Appellant, and if they intentionally caused the College to infringe on Appellant's Section 1981 rights, or if they authorized, directed, or participated in the alleged discriminatory conduct, they may be held liable. See Manuel v. International Harvester Company, 502 F.Supp. 45 (N.D. Ill. 1980); Coley v. M & M Mars, Inc., 461

F.Supp. 1073 (M.D. Ga. 1978): see also Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236-37 (Section 1982 suit permitted against corporation and its directors.)

In his appeal to the Third Circuit, respondent contended that the District Court abused its discretion in denying discovery as to the deliberations of the Tenure Committee and other matters in the tenure process. Primarily at issue was the appropriateness of allowing inquiry into the Tenure Committee proceedings, including within that term comparative data as to the credentials of successful candidates to the extent considered by the Committee, respondent in his Brief filed with the Third Circuit having discussed the credentials in that context.

On the discovery issue, the Third Circuit stated that on remand, the District Court should reconsider the

discovery rulings appealed in light of the recent Third Circuit decision in Equal Employment Opportunity Commission v. Franklin and Marshall College, 775 F.2d 110 (3d Cir. 1985). Certiorari has since been denied in the Franklin and Marshall case. _____ U.S.L.W. _____ (June 2, 1986).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Third Circuit applying 42 U.S.C. § 1981 to an "Arab" who is Caucasian (a) erroneously extends the scope of § 1981, (b) conflicts with a decision in the Fourth Circuit, and (c) raises an important question of federal law.

As to the race and 42 U.S.C. § 1981 claims, it is respectfully submitted that the Third Circuit erred in concluding that plaintiff-respondent [hereinafter sometimes plaintiff] may sue under 42 U.S.C. § 1981, even though, based on his own deposition testimony, plaintiff is Caucasian, (Appendix 38a) i.e., racially white, and, therefore, not a protected person under § 1981 when he is presumably claiming other Caucasians or whites were

improperly favored over him.[2] This is the first case, to the knowledge of counsel for petitioners, that has held that a claim of discrimination on the basis of being an Iraqi or Arab is cognizable under § 1981 and one case, Ibrahim v. New York State Department of Health, 581 F.Supp. 228 (E.D.N.Y. 1984), has held squarely to the contrary.[3]

The Third Circuit's decision here directly conflicts with the decision of

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[2]It may be of significance that the EEOC, Government-Wide Standard Race/Ethnic Categories, 42 Fed. Reg. 17,900 (1977), read, inter alia: "1. White, not of Hispanic Origin.--Persons having origins in any of the original peoples of Europe, North Africa, or the Middle East."

[3]In one previous case, Abdulrahim v. Gene B. Glick Co., Inc., Civil No. F 84-337 (N.D.Ind. June 26, 1985) (available on LEXIS, Genfed library, Dist file), the District Court held that an allegation that a Palestinian/Syrian was "non-white" was sufficient to make out a § 1981 claim. As noted previously, there is no such allegation of color in the complaints here.

the Fourth Circuit in Shaare Tefila Congregation v. Cobb, 785 F.2d 523 (4th Cir. 1986), interpreting the race discrimination provisions of 42 U.S.C. §§1981 and 1982. In Shaare Tefila Congregation, the Fourth Circuit held that "discrimination against Jews is not racial discrimination." 785 F.2d at 527. While Shaare Tefila Congregation did not involve Arabs, any difference between "Arabs" and "Jews" would not prevent Al-Khazraji and Shaare Tefila Congregation from being substantially indistinguishable.

As background to the present § 1981 issue, this Court, in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 2189 (1968), stated: ". . . In sharp contrast to the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968 . . . the statute [§ 1982] deals only with racial discrimination and does

not address itself to discrimination on grounds of religion or national origin." (Emphasis supplied) Although Jones v. Alfred H. Mayer Co., was concerned with 42 U.S.C. § 1982, the limitation of § 1982 to racial discrimination applies equally to 42 U.S.C. § 1981. See Runyon v. McCrary, 427 U.S. 160, 96 S. Ct. 2586 (1976); State of Georgia v. Rachel, 384 U.S. 780, 791, 86 S.Ct. 1783, 1789 (1966).[4]

In Runyon v. McCrary, supra, 427 U.S. at 167-68, this Court stated:

> It is worth noting at the outset some of the questions that these cases do not present . . . . They do not present any questions of the right of a private school to limit its student body to boys,

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[4]42 U.S.C. § 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

> to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity. They do not even present the application of § 1981 to private sectarian schools that practice racial exclusion on religious grounds. Rather, these cases present only two basic questions: whether § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes, and, if so, whether that federal law is constitutional as so applied. [Footnote number omitted.]

In Georgia v. Rachel, supra, 384 U.S. at 791, commenting on the Civil Rights Act of 1866 [now 42 U.S.C. § 1981 in slightly changed form], the Court noted that the phrase "any law providing for . . . equal civil rights" was not intended and should not be construed to apply to discrimination on any basis other than race:

> "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality. As originally proposed in the Senate, § 1 of the bill that became the 1866 Act did not contain the phrase 'as is enjoyed by white citizens.' That phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected." [Footnote number omitted.]

It should be noted that in the state discrimination complaints filed by plaintiff prior to filing the federal court case plaintiff never claimed racial bias. In the state court action he claimed "ethnic (Arab) and religious (Muslim) background were involved and included" (Exhibit E-3 to Motion for Summary Judgment -- p. 6 of state Amended Complaint) (190a) and in the Pennsylvania Human Relations Commission complaint, which it is believed was also the EEOC complaint, "have discriminated against me

because of my national origin, Iraq, my ancestry Arabian, and my religious creed Muslim." In the three federal court complaints (7a, 11a, 26a) he twice claimed "Muslim, Arabian, and Iraqi in national origin," once claimed "national origin and religion," and also claimed "national origin (Iraq), religion (Muslim), and/or race (Arabian)." Race here thus is not used by plaintiff in the § 1981 racial sense, but instead in a national origin sense. Furthermore, as previously noted, this term is not used in the Amended Complaint which is the operative one as to § 1981 and the only one which raises a § 1981 claim. At his deposition plaintiff stated, at pp. 6, 7-8 [This matter is discussed at greater length at pp. 6-9 of petitioner's deposition.]:

> Q. Are you also taking the position that you were denied tenure because of your race?

A. Yes.

Q. What is your race?

A. Caucasian but I was a different branch of the Caucasian race than you are. I am Caucasian but a different branch. I am claiming the national origin which is closer related to race and religion. [p. 6]

* * *

Q. What other reasons did you say you feel you were discriminated against?

A. National origin and religion or a combination of the two.

Q. What is your national origin?

A. Arabian and Iraqie.

Q. Are both Arabian and Iraqie-

A. and Moslem.

Q. Are both Arabian and Iraqie national origin designations?

A. Iraq is part of Arabia.

Q. You are treating Arabia as a place of national origin?

A. You may say so. This is what we call the Arabian peninsula.

> Q. That is the geographical area?
>
> A. That's right. This separates it from Iraq, Pakistan and so forth. It makes the Arabian peninsula separate. [pp. 7-8]

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), is not inconsistant with the view that § 1981 does not apply to a claim by a Caucasian when he or she is presumably claiming other Caucasians or whites were improperly favored over him. A claim based on status as a Arab or an Iraqi, it is submitted, is a national origin claim, not a racial claim. If such a claim is treated as a racial claim, then it is difficulty to see much, if any, basis for limiting the extent to which national origin claims are also racial ones. The Third Circuit here has defined race, for § 1981 purposes, as "membership in a group that is ethnically and

physiognomically distinctive." (Appendix 24a). The net result appears to be a substantial expansion in the scope of § 1981 beyond the language of the statute and, based on the discussion of the legislative history in the concurring opinion of Judge Adams, "well beyond what Congress intended when it passed the law.[1] " [Footnote is omitted.] (Appendix 32a) Such a drastic expansion of the statute warrants this Court's attention.

Furthermore, as a matter of policy, it is respectfully submitted that expansion of 42 U.S.C. § 1981 is inconsistent with the statutory scheme of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., which specifically covers national origin discrimination and under which, as noted by this Court in Great American Federal Savings & Loan Association v.

Novotny, 422 U.S. 366 (1979), cases are "subject to a detailed administrative and judicial process designed to provide an opportunity for non-judicial and nonadversary resolution of claims." While this Court has "held that the passage of Title VII did not work an implied repealer of the substantive rights to contract conferred by the . . .statute codified at . . . § 1981," Novotny at 377, no reason of policy appears to justify expansion of § 1981 in light of the existence of Title VII.

As to the effect of the expansion here of § 1981, Judge Adams, in his concurring opinion, notes in footnote 1 (Appendix 32a)

> In light of the continual flow of immigrants to the United States, the consequences of this expansion are quite substantial. Persons from most of the Middle East and Asia, for example, would

> now appear able to sue under § 1981. As of 1980, there were 2,539,800 persons born in Asia living in the United States, as well as 43,400 from Egypt and 71,500 from North Africa. United States Department of Commerce, Bureau of Census, Statistical Abstract of the United States (1985), at 87. I do not mean to suggest that this inflow is in any way undesirable; the figures, rather, point up the extent of the expansion of the statute, which underpins, I believe, the need for Congress, as opposed to the judiciary, to decide on the appropriateness of this result.

One of the potential difficulties possibly present in the approach of the Third Circuit here is expressed in the following excerpt from the decision in Sere v. Board of Trustees of the University of Illinois, 628 F.Supp. 1543, 1546 (N.D. Ill. 1986) [Footnote and footnnote number are omitted.]:

> Sere argues that he is a Nigerian black, while his supervisor and replacement are American blacks with lighter skin pigmentation. But this is

> insufficient to save Count II. It is settled law in this circuit that discrimination on the basis of national origin is not actionable under § 1981, Anooya v. Hilton Hotels Corp., 733 F.2d 48, 50 (7th Cir. 1984), and although the court recognizes that discrimination based on skin color may occur among members of the same race, plaintiff is unable to offer any authority for the novel proposition that such discrimination may form the basis of a cause of action under § 1981. This court refuses to create a cause of action that would place it in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit. Count II must therefore be dismissed.

For the foregoing reasons, plenary consideration by this Court is essential and respectfully requested.

II

The decision of the Third Circuit not to apply its decision in **Goodman v. Lukens Steel** retroactively (a) conflicts with decisions in other circuits, (b) conflicts in principle with this Court's decision in **Chevron Oil Co. v. Huson**, and (c) raises an important question of federal law.

In Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), the Third Circuit concluded that the ruling of this Court in Wilson v. Garcia, ___ U.S. ___, 105 S.Ct. 1938 (1985) mandated that Pennsylvania's two-year statute of limitations for personal injuries be applied to actions brought under 42 U.S.C.§ 1981. The Court also applied the decision retroactively to a § 1981 action commenced in 1973. However, in the instant case, Al-Khazraji, the Third Circuit, in applying Chevron Oil Co. v. Huson, refused to apply the two year

statute retroactively and instead held that its decision in Goodman would not be applied retroactively to § 1981 causes of action accruing, it would appear, after 1977 and for some period after. As previously stated, the denial of tenure was in February of 1978.

The present status of retroactivity decisions nationally under the various Civil Rights Acts is summarized by Mr. Justice White in his dissent to the denial of certiorari in Mulligan v. Hazard, 777 F.2d 340, cert. denied, 54 U.S.L.W. 3808 (June 10, 1986): [5]

> In Wilson v. Garcia, ___ U.S. ___ (1985), we held that an action brought under 42 U.S.C. § 1983 should be considered a personal injury action for purposes of borrowing an appropriate state

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[5] The Seventh Circuit has also dealt with the issue in Anton v. Lehpamer, No. 85-2565 (7th Cir. April 3, 1986) (available on Lexis, Genfed library, USAPP file) (nonretroactive application).

statute of limitations. Since our decision in that case, the courts of appeals have differed on whether Wilson should be given retroactive effect. In the present case, the Sixth Circuit held, without qualification, that Wilson should be given retroactive effect. 777 F.2d 340 (1985). The Courts of Appeals for the Fifth and Eleventh Circuits have reached similar results. Gates v. Spinks, 771 F.2d 916 (CA5 1985), cert. denied, ___ U.S. ___ (1986); Jones v. Preuit & Mauldin, 763 F.2d 1250 (CA11 1985), cert denied, ___ U.S. ___ (1986). Two other courts of appeals, however, have determined that when retroactive application would shorten the statute of limitations, Wilson merits only prospective relief. Gibson v. United States, 781 F.2d 1334 (CA9 1986); Jackson v. City of Bloomfield, 731 F.2d 652 (CA10 1984). Although the Third and Eighth Circuits have applied Wilson retroactively in certain cases, it is unclear whether their holdings are designed to have universal application. See Wycoff v. Menke, 773 F.2d 983, 986-987 (CA8 1985); Fitzgerald v. Larson, 769 F.2d 160, 162-164 (CA3 1985); Smith v. City of Pittsburgh, 764 F.2d 188, 194-196 (CA3 1985).

In addition, the courts of appeals also have reached

conflicting results concerning what should be done when more than one state statute of limitations applies to personal injury actions. In Hamilton v. City of Overton Park, 730 F.2d 613 (1984) (en banc), cert. denied ___ U.S. ___ (1985), and Mishmash v. Murray City, 730 F.2d 1366 (1984) (en banc), cert. denied, ___ U.S. ___ (1985), the Tenth Circuit rejected, for § 1983 purposes, the state statute of limitations for intentional torts, and chose instead a state's residual statute of limitations. See generally Preuit & Mauldin v. Jones, ___ U.S. ___, ___ - ___ (1986) (White J. dissenting from the denial of certiorari). The Eleventh Circuit in Jones v. Preuit & Mauldin, supra, the Fifth Circuit in Gates v. Spinks, supra, and the Sixth Circuit in the present case, however, follow a different rule, and select the state statute of limitations governing intentional torts.

The Court's decision not to review the instant case marks the third time this term that it has refused to address these differences that exist between the courts of appeals; differences that are not likely to disappear without guidance from this Court. Given the square conflicts among the circuits, and the frequency with which these cases arise, I would

> grant the petition for certiorari in this case.

While the instant case involves section § 1981, rather than § 1983, the retroactivity issues are similar, if not identical. It should be noted that the three retroactivity cases in which certiorari was denied--Gates, Jones and Mulligan--are cases which are categorized as those in which Wilson v. Garcia was given retroactive effect. The issue is a recurring one. Plenary consideration by the Court thus is essential.

On the underlying retroactivity issue, as the Third Circuit noted, (Appendix 13a-14a), Chevron requires the federal courts to undertake a three-part analysis [citations are omitted.]:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or

> by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must...weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retrospective application, for [w]here a decision of this Court could produce substantially inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."
>
> 404 U.S. at 106-07.

Essentially, the Third Circuit's theory was that after 1977 the precedents in the circuit were sufficiently clear that plaintiff could reasonably have relied on them. Petitioners submit, first, that the precedents were not as clear as the opinion of the Third Circuit indicates. The opinion here in

Al-Khazraji relies primarily on Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978), as making it "absolutely clear that the six-year limitations period for contract actions applied to Section 1981 actions brought to redress employment discrimination." (Appendix 16a)

A number of comments should be made in response to this statement in the opinion. First, Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978) [hereinafter sometimes Davis], did not apply a six year statute of limitations generally to section 1981 actions. The opinion specifically states, at 341 n. 8: "We reiterate that, for statute of limitations purposes, each complaint and different aspects of the same complaint may be treated differently. We hold only that 12 P.S. [section] 31 applies to actions where the gist of a [section]

1981 complaint concerns racially discriminatory discharge of an employee under the facts in this record." (Emphasis supplied.) [6] Thus, from Davis itself, it was not "absolutely clear that the six-year limitations period for contract actions applied to Section 1981 actions brought to redress employment discrimination." Furthermore, Davis was a discharge case and not a denial of tenure case. Counsel for petitioner is not aware of any Third Circuit case or case decided by a District Court in the Circuit, decided prior to the filing of the instant case in November of 1980, that held that the six year statute of limitations applied to a § 1981 denial of tenure case. Furthermore, since Davis

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[6] As counsel for petitioners reads Davis, the Third Circuit did not decide whether the tort action not involving personal injury portion or the contract portion of former 12 P.S. 31 made the six year statute applicable there.

was decided under an earlier version of the Pennsylvania statute of limitations scheme, it is submitted that there cannot have been justifiable reliance on Davis in view of a 1978 revision of the Pennsylvania statute of limitations scheme, particularly as the record shows that petitioner had counsel at least as early as May, 1979, well before the two year statute of limitations would have run[7]. (207 a)

It is also submitted that in view of the status nationally of statute of limitation periods under the various Civil Rights Acts, as discussed in Smith v. City of Pittsburgh, 764 F.2d 188, 192-193 (3d Cir. 1985) and Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984), aff'd, ___ U.S. ___, 105 S.Ct. 1938 (1985), the

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[7]The new Pennsylvania statutory scheme is discussed in more detail in the opinion of Judge Ziegler, at Appendix 60a-65a.

determination of what is "precedent on which litigants may have relied" (Chevron, 404 U.S. at 106) is not limited to precedent of the Third Circuit, but is to be determined on a national basis. On such a basis there was no precedent on which respondent may have relied. As this Court said in Wilson v. Garcia, 105 S.Ct. at 1942, "Thus, the conflict, confusion, and uncertainty concerning the appropriate statute of limitations to apply to this most important, and ubiquitous, civil rights statute provided compelling reasons for granting certiorari." The situation as to § 1981 is described in 3 A. Larson, Employment Discrimination, § 90.20, at pp. 18-23-18-36, in a release as of November of 1984 [Footnotes and footnote numbers are omitted.]: "Decisions vary from state to state, with some states using the statute of limitations for contract actions, tort

actions, actions for the recovery of wages, or actions brought under antidiscrimination or other state or Federal statutes."

For the foregoing reasons, plenary consideration by this Court is essential and is respectfully requested.

III.

The decision of the Third Circuit that the individual defendants may be held personally liable under the facts here (a) erroneously extends the scope of Section 1981, (b) raises an important question of federal law, and (c) appears to be inconsistent in principle with the decision of this Court in Anderson v. Liberty Lobby.

As noted by District Judge Mencer in his opinion granting the motion for summary judgment, (Appendix 41a-43a) the crux of the situation as to the individual petitioners-defendants is as follows:

> . . . the function of the Tenure Committee, and its members in voting, under the Guidelines for Tenure, is to make recommendations, and the Committee and its members do not have decision-making capacity and authority. The Tenure Committee, and its members in voting, under the Guidelines for Tenure, are to render a qualitative judgment, which judgment here, as manifested in the vote of

> the Committee, was negative. The authority and power of the Board of Trustees, under the governing College documents, including the Guidelines for Tenure, was exercised to deny and withhold tenure . . . . [T]heir [the individual defendants] function in the tenure process is merely to make a recommendation and they do not have decision-making capacity and/or authority. . . . In view of the limited, non-decision-making role of the individual defendants in the tenure process, they are thus not subject to liability under any of the theories propounded by plaintiff. (Emphasis added.)

It is respectfully submitted that the analysis of the District Court succinctly and correctly analyzes the issue of the liability of the individual petitioners. The cases cited by the Third Circuit, (Appendix 27a-28a) under the facts here, are not to the contrary.

The reversal of the granting of the summary judgment motion appears to be inconsistent with the recent decision of this Court in Anderson v. Liberty Lobby,

No. 84-1602 (U.S. Supreme Court June 25, 1986) (available on Lexis, Genfed library, US file). Based on the limitedd, non-decision-making role of the individual petitioners in the tenure process, a fact not disputed by plaintiff below, the evidence is "so one-sided that one party [,here the individual petitioners,] must prevail as a matter of law." Anderson v. Liberty Lobby, at _____ _____.

In this regard, as to the summary judgment aspect as to all petitioners, the Third Circuit did not deal with that portion of the district court's rationale for granting summary judgment which is mentioned, in part, in the following excerpt from the Court's Opinion, at p. 7, (Appendix 7a) "Judge Mencer held that Al-Khazraji had not made out a prima facie case under Section 1981 because, since 1978, the only other person to

receive tenure in the Department of Behavioral Science at St. Francis was Al-Khazraji's wife." As to this aspect, Judge Mencer stated (Appendix 36a-37a):

> Proof of intent and purposeful discrimination are necessary elements of a Section 1981 claim. Croker v. Boeing Company, 662 F.2d 975 (3d Cir. 1981).
>
> During the academic year at issue, Academic Year 1977-1978, no other person in the Department of Behavioral Science was recommended for tenure by the Committee on Tenure or granted tenure by the Board of Trustees, no other person in the Department was recommended for, and granted, tenure until Academic Year 1979-1980 (two years after the tenure decision as to plaintiff), that person was Emilie Allan, the wife of plaintiff Majid Ghaidan Al-Khazraji Allan, and no other person in the Department who was a sociologist, the field of expertise of plaintiff, Dr. Al-Khazraji Allan, has since that time applied for, been recommended for, or been granted tenure.

The conclusion of District Judge Mencer is consistent with the principle

that the existence of the following is one of the minimum requirements for a prima facie case of discrimination in a Title VII higher education context, the requirements for a Section 1981 claim arguably being even higher:[8] "Tenure

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[8]The language used is from Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148 (D. Mass. 1980), language being adopted by the Court of Appeals at 648 F.2d 62 (1st Cir. 1981).

This articulation is for the purposes of this Petition only. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981), has in fact eased the role of defendants in employment discrimination cases. The Third Circuit in Croker v. Boeing Co., 662 F.2d 975, 991 (3d Cir. 1981) (en banc), describes the procedures under Burdine as follows:

> Once a plaintiff class has made out a prima facie case of discriminatory treatment, the burden shifts to the defendant to rebut the inference of discrimination by showing that the statistics are misleading or inaccurate, or by presenting legitimate, nondiscriminatory reasons for the disparity. See Texas Department of Community Affairs v. Burdine, 450 U.S.

positions in the Department of _____ at _____ College were open at the time plaintiff was denied tenure, in the sense that others were granted tenure in the department during a period relatively near to the time plaintiff was denied tenure."

Again, in the absence of evidence that tenure positions were so open at Saint Francis College, the evidence

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8 CONTINUED

> 248, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); Wetzel, 508 F.2d at 259. It is now clear that a defendant's burden is one of production, not persuasion. It is sufficient to meet that burden if the defendant's admissible evidence clearly "raises a genuine issue of fact as to whether it discriminated against the plaintiff." See Burdine, 101 S.Ct. at 1094.

Furthermore, it is, of course, not conceded that the burden of a plaintiff alleging employment discrimination is as easy in § 1981 cases as it may be in Title VII cases.

present is "so one-sided that one party [,all of the petitioners,] must prevail as a matter of law." Anderson v. Liberty Lobby, supra.

It is respectfully submitted that the effect of not affirming as a matter of law the grant of summary judgment as to the individual petitioners, especially in conjunction with the decision in Equal Employment Opportunity Commission v. Franklin and Marshall College, 775 F.2d 110 (3d Cir. 1985), cert. denied, _____ U.S.L.W. _____ (June 2, 1986), discussed infra in Reason IV, will likely have a devastating effect, at the very least, on the internal peer-review system in tenure deliberations and perhaps even on external review, and ultimately could affect the tenure system itself. If faculty members are to be subject to suit individually for exercising their expertise, who will willingly serve on a

tenure committee or vote negatively on a tenure application.

For the foregoing reasons, plenary consideration by this Court is essential and is respectfully requested.

IV.

The decision of the Third Circuit in determining that the District Court should reconsider the discovery rulings appealed in light of its recent decision in **Equal Employment Opportunity Commission v. Franklin and Marshall College**, 775 F.2d 110 (3d Cir. 1985), rather than affirming the denial of the discovery appealed, (a) erroneously refuses to protect the secrecy and confidentiality of the Tenure Committee proceedings and (b) raises an important question of federal law.

Let it be noted at the outset that the discovery issue need be determined only if the District Court erred in granting the motion for summary judgment. No portion of the decision of the District Court is dependent on any of the matters about which respondent-plaintiff wanted to inquire during discovery. The dispute is as to those matters which for convenience are described as the "tenure committee" issues.

The questions in dispute as to the Tenure Committee seem to fall into four general categories: (1) the vote, (2) reasons for individuals voting as each did, (3) discussions and procedures followed at the meeting(s), (4) minutes of meeting(s).

For convenience, the term question or questions will be used as a generic term to refer to the inquiries inherent in the Interrogatories, Motion for Production of Documents, and the deposition of the Tenure Committee member. Also, the discussion will be restricted to the appropriateness of allowing inquiry into the Tenure Committee proceedings, including within that term comparative data as to the credentials of successful candidates to

the extent considered by the Committee.[9]

The reasons for objecting to the questions asked are set forth in the Response to Motion For Production of Documents (91a - 99a) and Objections Of Defendant, Saint Francis College, To Certain Of Plaintiff's First Interrogatories To Defendant St. Francis College (100a - 116a) and will not be repeated here. They are incorporated herein by reference. In essence, as relevant here, the objections raise privilege and the trial court's discretion to limit and control discovery.

Comparison of the questions asked here and those asked in Equal Employment

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[9]Brief for Appellant in the Third Circuit discusses the credentials in that context and, therefore, this petition will restrict itself to that context.

Opportunity Commission v. Franklin and Marshall College, 775 F.2d 110 (3d Cir. 1985), cert. denied, 54 U.S.L.W. 3792 (June 2, 1986), reveals that the scope of inquiry is substantially broader here.

It is respectfully submitted that the decision in Franklin and Marshall College is incorrect and that the materials requested here on appeal to the Third Circuit should be protected from discovery.

Petitioner College was one of the Amici Curiae who joined in the Brief of 67 Colleges and Universities as Amici Curiae in Support of Petition in the Franklin and Marshall College case.

Reiteration of the reasons set forth there for granting review appears unnecessary. They have already been

called to the attention of the Court.[10]

However, it should be noted that at issue here, and in every other case where an attempt is made to invade the secrecy and confidentiality of college or university tenure committee processes, is whether or not "peer review" will continue in American higher education or whether the entire tenure process will

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[10] In his dissent to the denial of the petition for certiorari in Franklin and Marshall College, 54 U.S.L.W. 3792 (June 2, 1986), Mr. Justice White stated:

> The United States Court of Appeals for the Third Circuit rejected the asserted privilege [against the compelled production of confidential peer review materials absent a showing of facts supporting an inference of discrimination], 775 F.2d 110 (1985), which has been accepted by another Court of Appeals, see EEOC v. University of Notre Dame du Lac, 715 F.2d 331, 337, n. 4 (CA7 1983). I would grant certiorari to resolve this conflict.

eventually be relegated exclusively to administrators, rather than primarily to teachers.[11] If the confidentiality of the proceedings and the vote is not maintained when provided for, as it is here, in the tenure rules of a college or university, those who will willingly serve on a tenure committee or who will vote negatively on a tenure application on the merits will decrease, to the

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[11]The issues related to the vote aspect were raised in the well-known James A. Dinnan case (Blaubergs v. Board of Regents of the University System of Georgia, 661 F.2d 426 (5th Cir. 1981)), where a University of Georgia professor choose to be jailed for contempt rather than reveal his vote.

Comment on the Dinnan case and its effect on the peer-review system set out in excerpts from the Suggestion For Rehearing En Bank filed by counsel for Dinnan before the United States Court of Appeals for the Eleventh Circuit (former Fifth), at 4-9, were included in the Brief of Appellees College and Gervase Cain in the District Court and the Court is invited to peruse these excerpts.

detriment of higher education in the United States.

Nationally the peer-review system commonly employs confidential votes and deliberations. The procedures here explicitly provide for such confidentiality. The Guidelines for Tenure here provide in Committee on Tenure V.C., "[The chairman] shall inform the committee that all deliberations are to be held permanently confidential." (194a)

The essence of the argument for maintaining the confidentiality of the peer review system is contained in the following excerpt from the District Court opinion in Gray v. Board of Higher Education, City of New York, 92 F.R.D. 87, 92-93 (S.D.N.Y. 1981), rev'd, 692 F.2d 901 (2d Cir. 1982). Gray, at one time the leading case upholding the secrecy of tenure committee votes, based its decision both on a privilege basis

and as a matter of the trial court's discretion to limit and control discovery. The Gray court stated, at 92-93:

> The peer review system of decision making with regard to the granting or withholding of tenure is intended to ensure that academic considerations will be of primary concern in the decision whether or not to grant tenure, and has been said to embody "the essence of academic freedom." Kundra v. Muhlenberg College, 621 F.2d 532, 547 (3d Cir. 1980). "The peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution." Kunda, supra, at 548.
>
> The maintenance of the confidentiality of the decision-making process is generally an integral element of a peer review system for granting or withholding tenure. McKillop v. Regents of the University of California, 386 F.Supp. 1270, 1276 (N.D.Cal. 1975) ("Plaintiff's suggestion that full disclosure encourages more thoughtful and honest tenure evaluations represents a

somewhat utopian view of human relationships."). See, Note, Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege, 69 Calif.L.Rev. 1538, 1551-52 (1981)....

* * *

The secret ballot has long been regarded as essential to any voting process which is to be free of influence and pressure from those with power and/or influence over those voting. In U.S. v. Executive Committee of the Democratic Party of Greene County, Ala., 254 F.Supp. 543 (N.D.Ala. 1966), the court stated that "[t]he secrecy of the ballot is one of the fundamental civil liberties upon which a democracy must rely most heavily in order for it to survive. This view was recognized by Congress in its passage of the National Labor Relations Act. That Act, specifically 29 U.S.C. §§ 159(e)(1) and 179(b), requires that employee votes to rescind designation of a labor organization as the employees' bargaining agent, or to accept or reject a settlement proposal, must be conducted by secret ballot. The requirement of "complete secrecy of the ballot cannot be waived." Magic Pan, Inc. v. N.L.R.B., 627 F.2d 105, 109 (7th Cir. 1980). See also N.L.R.B. v. Groendyke Transport,

Inc., 372 F.2d 137, 141-42 (10th Cir.), cert. denied, 387 U.S. 932, 87 S.Ct. 2054, 18 L.Ed 2d 993 (1967).

The basic arguments made here apply essentially to each of the four categories of questions asked.

Categories (2), reasons for individuals voting as each did, and (3), discussions and procedures followed at the meeting(s), are essentially sub-categories of Category (1), the vote, and in all probability would almost inevitable reveal votes, as well as themselves defeating the confidentiality of the tenure process. Whether Category 4, minutes of meeting(s), would violate the confidentiality aspect would, of course, depend on what is contained therein. To the extent that the minutes would also violate such confidentiality they should be treated the same as Categories 2 and 3. Thus, confiden-

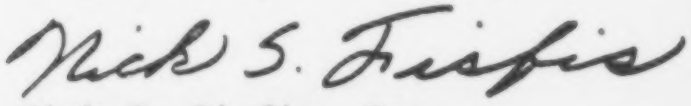
tiality should be retained as to each of the four categories of questions and the College and the witnesses should not be required to answer these questions and produce these documents.

For the foregoing reasons, plenary consideration by this Court is essential and is respectfully requested.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner reiterates that Question 5 is presented herein, not as a reason for granting certiorari, but because determination of this issue in favor of petitioners would obviate the need for the expense and disruption of trial for the parties.

Respectfully submitted,



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July, 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3205

MAJID GHAIDAN AL-KHAZRAJI,
a/k/a MAJID AL-KHAZRAJI ALLAN,

Appellant

vs.

SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RADRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, individually and in their official capacities

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Appeal from the United States
District Court for the
Western District of Pennsylvania (Pittsburgh)
(D.C.Civil No. 80-1550)

Argued December 5, 1985

BEFORE: ADAMS, GIBBONS, and STAPLETON,
Circuit Judges

(Filed: March 3, 1986)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*

I.

This is an appeal from a summary judgment entered in favor of the defendants below. Appellant, Majid Ghaidan Al-Khazraji, alleges that he, a U.S. citizen, was denied tenure at St. Francis College on account of his race, religion, and national origin. On appeal, appellant's case is premised on Title VII, 42 U.S.C. § 1981 and pendent state law claims. We affirm the district court as to the Title VII claim, and reverse as to the Section 1981 and pendent claims.

II.

FACTS

Majid Ghaidan Al-Khazraji was employed for over five years as an associate professor at St. Francis College in Loretto, Pennsylvania. Al-Khazraji, who was born in Iraq, is a United States citizen and a member of the Muslim faith. He has received advanced academic degrees from Cornell University and the University of Wisconsin.

Al-Khazraji applied for tenure at St. Francis in January, 1978. On February 10, 1978, the Tenure Committee voted to recommend to the Board of Trustees that tenure not be granted. Al-Khazraji was informed of that decision and on February 23, 1978,

the Board adopted the Tenure Committee's recommendation.

On March 20, 1978, Al-Khazraji received a one-year written contract from St. Francis for the 1978-1979 academic year. This contract was not renewable beyond May 26, 1979. Al-Khazraji signed this terminal contract.

Although apparently no established procedures existed, Al-Khazraji sought internal review of this adverse decision. He did not at that time take any other action. Christian Oravec, president of St. Francis, and David McMahon, Al-Khazraji's department chairperson, advised him in a series of meetings "not to 'do anything until St. Francis made a final decision on [his] petition for reconsideration of the denial of [his] tenure application.'"[1] Al-Khazraji understood this as a request to refrain from taking action with any outside agency until he had "exhausted all of his options at the college."[2] In September, 1978, the Faculty Senate unanimously voted to permit the Faculty Affairs Committee to review the Tenure Committee's decision. The Faculty Affairs Committee did so and in January, 1979, recommended that the Faculty Senate request reconsideration of the tenure decision. On February 6, 1979, the Tenure Committee met and decided to not reconsider Al-Khazraji's application. Al-Khazraji worked his last day at the college on May 26, 1979.

On May 10, 1979, Al-Khazraji filed a suit against St. Francis in the Court of Common Pleas of Cambria County, Pennsylvania. In his complaint Al-Khazraji alleged that St. Francis had violated its own tenure

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1. Affidavit of appellant, 205a.

2. Affidavit of Thelma Grittith-Johnson, former Regional Director of the Pennsylvania Human Relations Commission ["PHRC"], Plaintiff's App. at 202a.

guidelines in denying him tenure. He also alleged that the decision was motivated by "bias, prejudice and discrimination," and that the College had improperly considered his "ethnic (Arab) and religious (Muslim) background." This lawsuit was dismissed with prejudice on October 26, 1983, for failure to prosecute. Al-Khazraji did not appeal this dismissal.

In September, 1978, almost seven months after learning of the Tenure Committee's first rejection of his application, Al-Khazraji contacted the Pennsylvania Human Relations Commission ("PHRC") and inquired about his rights under civil rights statutes. At that time, the PHRC did not docket cases which "charged termination as a result of wrongful doing until the termination had taken place. Notification of impending termination at some future date was considered insufficient reason to docket the charge or to proceed with the investigation."[3] Al-Khazraji was told that he could not file a charge with the PHRC until he had worked his last day at St. Francis College. He filed a complaint with PHRC on June 22, 1979, within thirty days of completing his final contract with St. Francis and over one year after he had first been informed of the Tenure Committee's decision. This complaint was deemed simultaneously filed with the Equal Employment Opportunities Commission.

On May 19, 1980, Al-Khazraji's PHRC complaint was dismissed. PHRC notified plaintiff of this in a letter, dated May 30, 1980, which gave two reasons for the dismissal. First, because "the alleged act(s) of discrimination occurred beyond the ninety (90) day period permitted by the statute of limitations;" second, because "Prior to filing your complaint, you took civil or criminal action that was based on the same issues

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3. Affidavit of Thelma Griffith-Johnson, App. at 202a.

as those raised in your complaint." Al-Khazraji did not appeal this dismissal.

On August 6, 1980, the EEOC issued to Al-Khazraji a right to sue letter.

III.

THE DISTRICT COURT

On October 30, 1980, Al-Khazraji filed a *pro se* complaint in the United States District Court for the Western District of Pennsylvania against St. Francis College. This complaint alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* by the college. He subsequently secured counsel and filed amended complaints naming the members of the Tenure Committee as additional defendants in their individual and official capacities. The amended complaints added allegations that the defendants had violated 42 U.S.C. §§ 1981, 1983, 1985(3), 1986, as well as the Pennsylvania Human Relations Act, 43 P.S. § 951 *et seq.* Al-Khazraji also alleged breach of contract and intentional infliction of emotional distress under Pennsylvania law.

On February 9, 1981, Judge Ziegler dismissed Al-Khazraji's claim under 42 U.S.C. § 1986 as untimely.

On September 30, 1981, Judge Ziegler dismissed Al-Khazraji's Title VII claim as untimely, relying on *Delaware State College v. Ricks*, 449 U.S. 250 (1980). *Al-Khazraji v. Saint Francis College*, 523 F.Supp. 386 (W.D.Pa 1981). Having dismissed the Title VII claim, Judge Ziegler also dismissed the ancillary 42 U.S.C. § 1985(3) claim. However, he retained Al-Khazraji's 42 U.S.C. §§ 1981 and 1983 claims and the pendent state law claims. Defendants had argued that these federal claims were barred by statutes of limitations. Judge Ziegler disagreed, and, following *Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978),

applied a six-year statute of limitations to both actions.

Judge Ziegler refused to view the Section 1981 claim as raising only a claim of discrimination based on national origin and not on race. Ziegler read Al-Khazraji's complaint as alleging that Al-Khazraji was denied tenure because he was of the "Arabian" race.[4] He held that this could serve as the basis for a civil rights action under Section 1981. 523 F.Supp. at 391-92. Al-Khazraji's case thus went forward based on Sections 1981, 1983, and the pendent state law claims.

On August 30, 1982, and October 8, 1982, the District Court denied certain requests by Al-Khazraji for discovery of the Tenure Committee's reasons for denying tenure.

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4. The district court was correct. Plaintiff's First Complaint, *pro se*, at Paragraph 7, alleges that "[defendants'] unlawful employment policy and practice consisted of refusing to renew the full-time faculty appointment of Majid G. Al-Khazraji, Ph.D., because of national origin, religion and/or race. . . ." Paragraph 8 alleges that defendants' conduct has deprived plaintiff of "equal employment opportunity and otherwise adversely affect[ed] his status as an employee because of his national origin, religion, and/or race." Plaintiff's second amended complaint, *pro se*, at Paragraph 7 alleges that "[Defendants are] depriving him of his Civil Rights...because of his national origin (Iraq), religion (Muslim) and/or race (Arabian)." The plaintiff's third complaint, which raised the Section 1981 charge, did not repeat the allegation of racial motivation. However, as Judge Ziegler observed, "[a]lthough the exact word 'race' may not appear in plaintiff's third complaint, which raised the claim under 42 U.S.C. Section 1981, plaintiff's position from the outset has been that he was subject to disparate treatment because of 'national origin, religion, and/or race.' We therefore decline to dismiss plaintiff's action under Section 1981 simply because he omitted the word 'race' in his third complaint. In our view, it is a technical defect of little significance. The thrust of plaintiff's claims, namely, that he was denied tenure by St. Francis College because he is an Arabian born in Iraq, is clear to all concerned. . . ." 523 F.Supp. at 391-92.

On November 28, 1984, defendants moved for summary judgment on the remaining issues in the case. On March 12, 1985, Judge Mencer granted summary judgment for defendants. Judge Mencer held that Al-Khazraji had not made out a *prima facie* case under Section 1981 because, since 1978, the only other person to receive tenure in the Department of Behavioral Science at St. Francis was Al-Khazraji's wife. Additionally, Judge Mencer held that a claim of discrimination on the basis of being an Arab is not cognizable under Section 1981.

Judge Mencer also dismissed the Section 1983 claim for lack of action taken under color of state law. Having dismissed the federal claims, Judge Mencer dismissed the pendent state law claims. Al-Khazraji appealed. Defendants raise a number of arguments supporting affirmance. These will be discussed seriatim.

IV.

A. Res Judicata

The Rules of Decision Act, 28 U.S.C. § 1738 requires federal courts to give a prior state court judgment the same *res judicata* effect as would be provided by the courts of that state. *Migra v. Warren City School District*, 465 U.S. 75 (1984); *Ligas v. City of Pittsburgh*, 765 F.2d 53 (3d Cir. 1985). Appellees argue that Al-Khazraji's suit in federal court is *res judicata* because of the prior state court and PHRC actions filed by Al-Khazraji. Neither contention is persuasive.

1. *Effect of The State Court Action*

Al-Khazraji's state court action never proceeded to a judgment on the merits. Rather, pursuant to Cambria County Court of Common Pleas Rule of Court

No. 33, the action was dismissed for failure to prosecute.[5] Pennsylvania courts give no *res judicata* effect to a dismissal for failure to prosecute. *See e.g.,Robinson v. Trenton Dressed Poultry Co.* ___Pa Super. ___, 496 A.2d 1240 (1985); *Bon Homme Richard Restaurants, Inc. v. Three Rivers Bank and Trust Company*, 298 Pa Super. 454, 444 A.2d 1272 (1982). Thus, the state court action is not *res judicata* to this suit.

2. Effect of PHRC Dismissal

The Pennsylvania Human Relations Act, 43 P.S. § 962(c), states:

> In cases involving a claim of discrimination, if complainant invokes the procedures set forth in this act, that individual's right of action in the courts of the Commonwealth shall not be foreclosed. If within one (1) year after the filing of a complaint with the Commission, the Commission dismisses the complaint...the Commission must so notify the complainant. *On receipt of such a notice the complainant shall be able to bring an action in the courts of common pleas of the Commonwealth based on the right to be free from discrimination granted by this act. . . .*

42 P.S. § 962(c) (emphasis added).

Appellees have not rebutted the clear statement in Section 962(c) that a dismissal by the PHRC does not

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5. "The prothonotary shall list . . . civil matters in which no steps or proceedings have been taken for two years or more prior thereto. . . . If no action is taken or no written objection is docketed in such matter prior to the general call on the first day of such court, the prothonotary shall strike the matter from the list and enter an order as of course dismissing the matter with prejudice for failure to prosecute, under the provisions of this rule."

foreclose resort to state courts. *See Nestor v. Quaker State Coca-Cola Bottling Company*, 579 F.Supp. 289 (W.D. Pa. 1984); *Fye v. Central Transportation Inc.*, 487 Pa. 137, 409 A.2d 2 (1979). Moreover, the letter received by Al-Khazraji from the PHRC dismissing his complaint read, in part: " In addition, the Pennsylvania Human Relations Act as Amended by Act 318, provides that upon receipt of this official notice, you may engage a private attorney as soon as possible and bring an action in the Court of Common Pleas for a judicial determination of your allegations of discrimination."

As a dismissal by PHRC does not foreclose resort to state courts, it does not foreclose resort to federal courts. *See Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 470 n. 7 (1982).

B. *STATUTE OF LIMITATIONS*

1. *Title VII*

Judge Ziegler, following *Delaware State College v. Ricks*, 449 U.S. 250 (1980), had dismissed Al-Khazraji's Title VII claims as untimely.[6] Subsequently, Al-Khazraji filed a motion with Judge Mencer, requesting reconsideration of that determination, and arguing that *Ricks* should not be

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6. *Ricks* held that in refusal to tenure cases, for purposes of both Section 1981 and Title VII, the act of discrimination is the making of the tenure decision and its communication to the teacher. This is true even if the teacher pursues internal grievance procedures and even if one of the effects of the denial of tenure -- the eventual loss of the teaching position -- does not occur until later. "[E]ntertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any way tentative. The grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made." 449 U.S. at 261.

applied retroactively.[7] Appellant does not dispute that *Ricks*, if applied retroactively, effectively forecloses his Title VII claim.

The presumption that the holding of a case will be applied retroactively as well as prospectively is merely a corollary of the principle that federal courts should apply the law in effect at the time that cases are adjudicated. *Gulf Offshore Company v. Mobil Oil Corporation*, 453 U.S. 473, 486 n.16 (1981); *Scott v. Local 863, International Brotherhood of Teamsters*, 725 F.2d 226, 228 (3d Cir. 1984).

The district court did not err in applying *Ricks* to appellant's case. The Supreme Court applied the rule of law announced in *Ricks* retroactively both to Ricks himself and in *Chardon v. Fernandez*, 454 U.S. 6 (1981). *Ricks*, of course, arose in this Circuit. Appellant has not pointed to any point of distinction between him and Mr. Ricks to justify retroactive application of the *Ricks* principle to Ricks and not to Al-Khazraji. *See Vuksta v. Bethlehem Steel Corp.*, 540 F. Supp. 1276, 1278 (E.D.Pa 1982), *affirmed* 707 F.2d 1405 (3d Cir.), *cert. denied* 464 U.S. 835 (1983) (applying *Ricks* retroactively to cause of action arising in September, 1977).

Furthermore, *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971), which discusses the criteria for deciding whether to except a particular holding from the presumption favoring retroactivity, favors retroactive application of *Ricks*. *See Fitzgerald v. Larson*, 769 F.2d 160 (3d Cir. 1985); *Smith v. City of Pittsburgh*,

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7. At oral argument before this court, Al-Khazraji argued that defendants are estopped from raising the statute of limitations by principles of equitable estoppel. This was not argued to Judge Ziegler, and at that time, there was no factual basis for estoppel in the record. Our review, of course, is confined to the record as it existed before Judge Ziegler when he dismissed the Title VII claim.

764 F.2d 188 (3d Cir.), *cert. denied* ___ U.S. ___, 106 S.Ct. 349 (1985). We need only discuss the first step of the *Chevron* analysis. In order to justify nonretroactive application, the judicial decision must announce a new principle of law that either overrules clear past precedent or decides an issue of first impression whose resolution was not clearly foreshadowed. *Chevron*, 404 U.S. at 106-07.[8]

When evaluating the state of the prior law, it is necessary to look to the time when the plaintiff's cause of action arose. If there is a clear precedent at that time upon which plaintiff might reasonably have relied in delaying suit, it is unfair to overturn that reliance after it is too late for the plaintiff to do anything about it.

The *Ricks* case originated in the District of Delaware. Prior to the Third Circuit's decision in *Ricks v. Delaware State College*, 605 F.2d 710 (3d Cir. 1979), *reversed* 449 U.S. 250 (1980), there was no precedent in this Circuit on which appellant could reasonably have relied. The Third Circuit opinion was issued on September 18, 1979, eighteen months after the initial tenure decision had been communicated to appellant.

The clearest example of the state of the law on this matter at the time Al-Khazraji's claim arose is the District Court opinion in *Ricks*, 22 BNA FEP Cases 788 (D. Del. 1978), *motion for reconsideration denied*, 22 BNA FEP Cases 793 (D. Del. 1978), *rev'd*, 605 F.2d 710 (3d Cir. 1978), *rev'd* 449 U.S. 250 (1980) (*aff'g* district court). The district court judge there found that *Meyers v. Pennypack Woods Home Ownership Association*, 559 F.2d 894 (3d Cir. 1977), a case arising under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* controlled. He read *Meyers* as leading to the

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8. See pp. 16-23 *infra* for further discussion of the *Chevron* analysis.

conclusion that the alleged discriminatory acts at issue were the denial of tenure and the award of the terminal contract, not the subsequent termination of employment.

Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3d Cir.), *cert. denied*, 439 U.S. 821 (1978), cited by Al-Khazraji, could not have provided him with any assurance that his final day of employment would be considered as the unlawful employment practice for Title VII. *See Ricks v. Delaware State College*, 22 FEP Cases 793 (D.Del. 1978) (discussing why *Bonham* does not apply).

Thus, Al-Khazraji cannot claim that, prior to the Third Circuit's decision in *Ricks*, there was any clear precedent on which he could have relied in delaying to file his federal action. Because Appellant had no grounds for reasonable reliance on a contrary rule, it is not inequitable to apply *Ricks* retrospectively.

2. *The Section 1981 Claim Against Appellee St. Francis College*

a. *Retroactive Application of Goodman v. Lukens Steel*

Appellees contend that Al-Khazraji's Section 1981 claim is barred by the statute of limitations. We disagree.

Because Section 1981 refers to no specific federal limitations period, federal courts are obligated to borrow the state limitations period which is applied to the state cause of action most analogous to the civil rights cause of action, so long as it is not deleterious to the federal rights involved. *Johnson v. Railway Express Agency*, 421 U.S. 454, 464-65 (1975); *See Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Swietlowich v. County of Bucks*, 610 F.2d 1157, 1162 (3d Cir. 1979).

This Circuit, from at least 1977 until 1985, had applied Pennsylvania's six-year statute of limitations in discrimination cases brought under Section 1981. *See Meyers v. Pennypack Woods Home Ownership Association*, 559 F.2d 894 (3d Cir. 1977); *Wilson v. Sharon Steel Corporation*, 549 F.2d 276 (3d Cir. 1977). Judge Ziegler, in his opinion below, properly applied the six-year limitations period to plaintiff's claim. Neither he nor this court foresaw the Supreme Court's recent ruling in *Wilson v. Garcia*, ___ U.S. ___, 105 S.Ct. 1938 (1985). *See Goodman v. Lukens Steel*, 777 F.2d 113, 118 (3d Cir. 1985).

However, *Wilson v. Garcia* has made it necessary for this court to re-examine its prior decisions. Consequently, in *Goodman*, we held that the Supreme Court's ruling mandated that Pennsylvania's statute of limitations for personal injuries be applied to actions brought under Section 1981. This is a two-year statute of limitations. 42 P.S. § 5524.

As noted above, the general presumption is that federal courts should apply the law in effect at the time that cases are adjudicated. *Gulf Offshore Company*, 453 U.S. at 486 n. 16; *Scott*, 725 F.2d at 228.

Chevron Oil Co. v. Hudson, 404 U.S. 97 (1971), sets forth the criteria for deciding whether to apply retroactively the holding of a case. *See Fitzgerald v. Larson*, 769 F.2d 160 (3d Cir. 1985); *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir.) *cert. denied* ——— U.S. ———, 106 S.Ct. 349 (1985). *Chevron* requires the federal courts to undertake a three-part analysis:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly

> foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retrospective application, for [w]here a decision of this Court could produce substantially inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (citations omitted).
We must evaluate these three factors in light of Al-Khazraji's claim.

1. *The Change from Prior Law*

The first *Chevron* factor requires that the prior law have been sufficiently clear that the plaintiff could have reasonably relied upon it in delaying suit. *Fitzgerald v. Larson*, 769 F.2d at 163. In 1973, when the complaint was filed in the *Goodman* case, there was no established precedent in the Third Circuit to indicate the appropriate limitations period for Section 1981 claims.[9] However, when the cause of action in Al-Khazraji's case arose, in early 1978, this was no longer true.

In *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977) the Third Circuit

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9. The cause of action that was the basis for the *Goodman* case arose in May, 1970. *Goodman*, 777 F.2d at 121, at n.4. The conclusion that *Goodman* is to be retroactively applied to the plaintiff in *Goodman* itself does not mandate that *Goodman* be retroactively applied to this plaintiff. The crucial distinction between the situation in *Goodman* and that involved here is the relative clarity of this Circuit's law regarding the proper limitations period. In 1970, that law was not clear. However, as discussed below, this had changed by the time Al-Khazraji's claim arose.

definitively applied Pennsylvania's six-year statute of limitations to a Section 1981 action. *Meyers* concerned a racially-motivated refusal to sell a house to plaintiff, a black man. The Court analogized Meyers' claim to a tort action involving "the wrongful interference with another's financial, commercial, or business rights. A victim of one of these torts suffers not so much from an emotional or mental trauma as he does from the actual denial of his right to lawfully pursue his business, employment, or personal affairs. Meyers appears to complain of just such a denial." 559 F.2d at 902. Having reached this conclusion, the court had no trouble in identifying the related six-year statute of limitations for contract actions and applying it to Meyers' claims. *Id* at 903: *See Wilson v. Sharon Steel Company*, 549 F.2d 276 (3d Cir. 1977); *Collier v. Philadelphia Gas Works*, 441 F.Supp. 1208, 1212 (E.D.Pa 1977); *Pierce v. Catalytic*, 430 F. Supp. 1180, 1182 (E.D.Pa 1977)

After *Meyers* and *Wilson*, a potential plaintiff whose complaint was based on "the denial of his right to lawfully pursue his . . . employment" could be fairly confident that a federal court in this Circuit would apply Pennsylvania's six-year statute of limitations to his or her section 1981 claim.

Although there were some earlier cases that borrowed a shorter limitations period for Section 1981 actions, *see Wilson v. Sharon Steel Corporation*, 399 F. Supp. 403 (W.D.Pa. 1975), *rev'd* 549 F.2d 276 (3d Cir. 1977); *Davis v. United States Steel Supply Company*, 405 F. Supp. 394 (W.D.Pa. 1976), *rev'd* 581 F.2d 335 (3d Cir. 1978); *Presseisen v. Swarthmore College*, 71 F.R.D. 34 (E.D.Pa 1976), by 1977 the district courts were uniformly applying the six-year limitations period for actions alleging interference with contractual rights. *See Collier*, 441 F.Supp. at 1212; *Groves v. Insurance Company of North America*, 433

F.Supp. 877, 884 (E.D.Pa 1977); *Pierce v. Catalytic, Inc.*, 430 F. Supp. at 1182; *see also Jones v. United Gas Improvement Corporation*, 383 F.Supp. 420, 430-31 (E.D.Pa 1974).

Just a few months after Al-Khazraji was informed of the Tenure Committee's decision, the Third Circuit, in *Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978), made it absolutely clear that the six-year limitations period for contract actions applied to Section 1981 actions brought to redress employment discrimination. *See Liotta v. National Forge Company*, 629 F.2d 903, 906 (3d Cir. 1980), *cert. denied* 451 U.S. 970 (1981); *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470 (3d Cir. 1978), *cert. denied* 444 U.S. 832 (1979). Thus, unlike the state of the law regarding the proper limitations period for Section 1983 actions, in early 1978 the precedents were sufficiently clear that Al-Khazraji could reasonably have relied upon them when deciding to delay filing his Section 1981 claim. *Compare Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985).[10]

For this reason, when the *Goodman* case was decided, it established a new principle of law and overruled clear past precedent on which litigants reasonably could have relied. When Appellant allegedly was discriminated against, and for several years after

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10. The 1978 change in the Pennsylvania law does not affect this conclusion. Effective June 27, 1978, a new statute of limitations went into effect in Pennsylvania. 42 P.S. Section 5527, which set forth a six-year limitations period for actions upon a contract, did not change the limitations period applicable under the prior law, 12 P.S. Section 31 (repealed). As Judge Ziegler noted below, there was nothing in the change to suggest that Pennsylvania intended that a shorter limitations period be substituted for the six-year period that formerly had applied to actions for breach of employment. 523 F. Supp. at 389-90; *See Villoa v. City of Philadelphia*, 95 F.R.D. 109, 114 (E.D.Pa. 1982).

he had initiated his federal action, these decisions represented the law governing his case. "It cannot be assumed that he did or could foresee that this consistent interpretation . . . would be overturned. The most he could do was to rely on the law as it then was. 'We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights.' *Griffin v. Illinois*, 351 U.S. 12, 26 (Frankfurter, J., concurring in the judgment)." *Chevron*, 404 U.S. at 107.

ii. *The Purposes of Goodman*

Wilson v. Garcia, ___U.S.___, 105 S.Ct. 1938 (1985), made the *Goodman* decision inevitable. In *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir.) *cert. denied* ____ U.S. ____, 106 S.Ct. 349 (1985), we analyzed the purposes of *Wilson* and concluded that it was intended to promote uniformity and the minimization of unnecessary litigation. 764 F.2d at 196. *Smith* found that the policies informing *Wilson* did not militate clearly either in favor of or against retroactive application. *Id. See Fitzgerald v. Larsen*, 769 F.2d at 164. The purposes of *Goodman* are the same as those of *Wilson v. Garcia*. Consequently, *Goodman* also is neutral in resolving this question.

iii. *The Equities of Retroactive Application of Goodman*

The third *Chevron* factor is whether retroactive application will achieve harsh, unjust, or inequitable results. *Fitzgerald*, 769 F.2d at 164. In *Fitzgerald*, Judge Sloviter observed that this factor overlaps with the first *Chevron* factor, for it would be inequitable to give retroactive application to a "shortening of the limitations period that altered established law upon which plaintiff could have reasonably relied." *Id.*

We have already decided that retroactive application of *Goodman* would defeat the reasonable expectations of those, like Al-Khazraji, who relied upon the *Davis* line of cases. "[I]t would produce the most 'substantial inequitable results' to hold that [Appellant] 'slept on his rights' at a time when he could not have known the time limitation that the law imposed on him." *Chevron*, 404 U.S. at 108 (citation omitted). Al-Khazraji's position is even more compelling. In 1981, because the district court applied the clear pre-*Goodman* rule, Al-Khazraji survived defendants' motion to dismiss the Section 1981 claims as untimely under a two-year statute of limitations. 523 F.Supp. at 386. If Judge Ziegler had ruled differently and then dismissed the pendent state claims, Al-Khazraji perhaps would not have permitted the state court non pros to be entered. Retroactive application of *Goodman* would probably compel dismissal of those pendent claims, as Section 1981 is the only federal cause of action left to Al-Khazraji. However, it may be too late for Al-Khazraji to rescue his state lawsuit. Because we cannot say whether Pennsylvania would permit him to reinstate that suit in state court, it seems possible that this might prevent him from litigating those claims. This seems to be a harsh result.

iv. *Goodman Is Not To Be Applied Retroactively to Al-Khazraji's Section 1981 Claim*

Because we find two of three *Chevron* factors present and the third neutral on this issue, we hold that, at least as to persons whose causes of action arose after 1977, *Goodman* should not be applied retroactively to alter the applicable Pennsylvania statute of limitations from six to two years. Thus, Al-Khazraji's federal lawsuit, filed in 1980, was timely. *Accord Elliott v. Group Medical and Surgical Care*, 714 F.2d 556, 563 (5th Cir. 1983), *cert. denied* — U.S. —, 104 S.Ct. 2658 (1984) (New judge-made rules

on limitations are usually not to be applied retroactively to a plaintiff who timely filed his complaint under the then-existing law of limitations).

C. *THE SECTION 1981 CLAIM*

1. *Race and The Section 1981 Claim*

Defendants next argue that Plaintiff may not sue under Section 1981 because Arabs are not a "protected minority." They argue that an ethnic Arab is taxonomically a Caucasian and therefore "not a protected person under Section 1981 when he is presumably claiming other Caucasians or whites were improperly favored over him."

We disagree and hold that ethnic Arabs may depend upon Section 1981 to remedy racial discrimination against them.[11]

The starting point of our analysis is the statute itself. 42 U.S.C. § 1981 provides that:

> All persons within the Jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The defendants argue that because Arabs are taxonomically Caucasians, they are therefore "white citizens" for purpose of Section 1981 and *a fortiori*, Section 1981 offers them no greater protection than they enjoy absent Section 1981.

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11. We do not reach the issue of Section 1981's applicability to claims of national origin discrimination. When the record is fully developed, it may or may not be necessary for the district court to address that issue.

The Supreme Court has ruled that individuals who are not black, but who have been victims of racial discrimination can sue under Section 1981. *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273 (1976). *McDonald* rejected the argument that Section 1981 is limited to the protection of nonwhites against racial discrimination. 427 U.S. at 287-96. The protection against racial discrimination thus extends beyond those who are taxonomically members of the Negro race. Appellant is therefore not prevented from invoking Section 1981 merely because he is taxonomically classified as a member of the Caucasian race. *Compare LaFore v. Emblem Tape and Label Company*, 448 F.Supp. 824, 826 (D.Col. 1978) (equating "white citizens" with a racial classification is "utterly lacking in sophistication. There is no scientific justification for the equation."). However, the Supreme Court did not make clear how the lower courts were to recognize the sort of discrimination proscribed by Section 1981.[12] Therefore, we turn for guidance to the legislative history.

Section 1981 was originally enacted as part of Section 1 of the Civil Rights Act of 1866, authorized by Section 2 of the thirteenth amendment to the United States Constitution. Because of doubts over Congress' authority to pass the Civil Rights Act of 1866, it was subsequently reenacted following the adoption of the fourteenth amendment as Section 18 of the Civil Rights Act of 1870, c.144 Section 18, 16 Stat. 144 (May 31, 1870). *See Jones v. United Gas Improvement*

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12. The Supreme Court, while it has often stated that Section 1981 exists to remedy racial discrimination, has never precisely defined its conception of "race." *See Johnson*, 421 U.S. at 459-60; *McDonald*, 427 U.S. at 287; *Jones*, 392 U.S. at 413; 2189; *Georgia v. Rachel*, 384 U.S. 780, 791, (1966).

Corporation, 68 F.R.D. 1, 10-11 (E.D.Pa 1975). Accordingly, Section 1981 has some ties to the fourteenth as well as to the thirteenth amendment. *Croker v. Boeing Company*, 662 F.2d 975 (3d Cir., 1981).

The Civil Rights Act of 1866 was directed primarily against the mistreatment of blacks by private individuals. *See Jones v. Alfred H. Mayer Company*, 392 U.S. 409, 427-28 (1968). Nevertheless, the bill was designed to ensure a more encompassing protection. Senator Trumbell introduced the bill as a measure "to protect *all persons* in the United States in their civil rights. . ." Cong. Globe, 39th Congress, 1st Sess., 211 (1866) (emphasis added). Senator Trumbell described the bill as applying to "every race and color." *Id. See also McDonald*, 427 U.S. at 288 n.19. Senator Howard described the bill's object as to give "to persons who are of different races or colors the same civil rights." Cong. Globe, 39th Congress, 1st Sess., at 504.

In The House of Representatives, Representative Wilson argued for passage of the bill on the grounds that it would "protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men." Cong. Globe, 39th Cong., 1st Sess. at 1118. He claimed that the bill would ensure "the equality of citizens . . . in the enjoyment of 'civil rights and immunities.'" and "secure[] to citizens of the United States equality in the exemptions of the law. . . . Whatever exemptions there may be shall apply to all citizens alike. One race shall not be more favored in this respect than another." Cong. Globe, 39th Cong., 1st Sess. at 1117. *See* remarks of Senator Hendricks, *Id.* at 601; Remarks of Representative Shallabarger, *Id.* at 1293; *see also Jones*, 392 U.S. at 436 ("[T]he Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not

under color of state law, with respect to the rights enumerated therein").

It was the measure's breadth that led to the amendment of the bill to include the limitation of the rights to those enjoyed by white citizens. Representative Wilson, who proposed the amendment, Cong. Globe, 39th Cong., 1st Sess. at 1115, explained the purpose of the amendment was to avoid extending these rights to "all citizens, whether male or female, majors or minors." *Id.* at App. 157, *quoted in McDonald*, 427 U.S. at 293. The Supreme Court has observed that this amendment "indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *Georgia v. Rachel*, 384 U.S. 780, 791-92 (1966); *see Johnson v. Railway Express Agency*, 421 U.S.454, 459-60 (1975) ("Section 1981 affords a federal remedy against private discrimination on the basis of race").

Representative Shallabarger stated that the effect of the amended bill was:

> to require that whatever rights as to each of those enumerated civil . . . matters the States may confer upon one race or color of the citizens shall be held by all races in equality. Your state may deprive women of the right to sue or contract or testify, and children from doing the same. But if you do so, or do not so as to one race, you shall treat the other likewise. . . . It secures - - not to all citizens, but to all races as races who are citizens -- equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races.

Cong. Globe at 1293.

Representative Shallabarger's discussion of the bill made it clear that he was not using the terms "race" or "color" in a crabbed fashion or to signify only those races identified by anthropologists as distinct. Cong.

Globe, 39th Cong., 1st Sess., at 1294. Shallabarger's conception of the bill's scope was much broader, and clearly not limited to a taxonomic definition of the key term in the bill.

> Who will say that Ohio can pass a law enacting that no man of the German race, and whom the United States has made a citizen of the the United States, shall ever own any property in Ohio, or shall ever make a contract in Ohio. . . . If Ohio may pass such a law, and exclude a German Citizen, not because he is a bad man or has been guilty of a crime, but because he is of the German nationality or race, then may every other state do so; and you have the spectacle of an American Citizen admitted to all its high privileges and entitled to the protection of his Government in each of these rights, and bound to surrender life and property for its defense, and yet that citizen is not entitled to either contract, inherit, own property, work, or live upon a single spot of the Republic, nor to breathe its air.

Id.

This review of the legislative history convinces this court that Congress did not intend to limit Section 1981 solely to those who could demonstrate that they had been discriminated against because they belonged to a particular group identified and described by anthropologists. When Congress referred in the statute to "race," it plainly did not intend thereby to refer courts to any particular scientific conception of the term. In fact, there is no precise definition of the word.[13]

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13. The dictionary provides an example of the lack of precision in the term.

> Race. A group of persons, animals, or plants, connected by common descent or origin; a tribe, nation, or people, regarded as of common stock; a group of several tribes or

We believe that Congress's purpose was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive.[14]

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peoples, forming a distinct ethnical stock; one of the great divisions of mankind, having certain physical peculiarities in common. 2 OXFORD ENGLISH DICTIONARY 2400 (1971, Compact Ed.).

Race. 1. Any of the different varieties of mankind, distinguished by form of hair, color of skin and eyes, stature, bodily proportions, etc.; many anthropologists now consider that there are only three primary major groups, the Caucasoid, Negroid, and Mongoloid, each with various subdivisions (sometimes also called *races*); the term has acquired so many unscientific connotations that in this sense it is often replaced in scientific usage by *ethnic stock* or *group*.

2. a population that differs from others in the relative frequency of some gene or genes. . .

3. any geographical, national, or tribal ethnic grouping. . . .

5. any group of people having the same activities, habits, ideas, etc. WEBSTER'S NEW WORLD DICTIONARY 1169 (1972 Ed.)

14. *See Gonzalez v. Stanford Engineering Inc.*, 597 F.2d 1298, 1300 (9th Cir. 1979): "A substantial portion of the Mexican population traces it roots to a mixture of the Caucasian (Spanish) and Native American races. With this background prejudice towards those of Mexican descent having a skin color not characteristically Caucasian must be said to be racial prejudice under 1981." But see *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970 (10th Cir. 1979). (Though Mexican Americans not technically another race, community attitudes differentiating Hispanics from "Anglos" are sufficient to bring care within Section 1981 because these attitudes are enough like racial prejudice.)

Some courts, in struggling with this definitional problem, have concluded that it is impossible to distinguish "race" from considerations of "national origin." This is because they have concluded that "[t]he notion of race is a taxonomic device and, as with all such constructs, it exists in the human mind [and] not as a division in the objective universe." *Ortiz v. Bank of America*, 547 F. Supp. 550, 565 (E.D. Calif. 1982). Thus, in their view, the separation of *homo sapiens* into subgroups is largely determined by the reasons for the separation.[15]

While the distinction between racial discrimination, which is cognizable under Section 1981, and other types of discrimination, which may not be cognizable, may in some instances be obscure, that cannot justify refusing to attempt the distinction. Discrimination based on race seems, at a minimum, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*.

Because Al-Khazraji was unable to conduct full discovery prior to the defendants' motion for summary judgment, we do not have before us a sufficent record to determine whether he has been subjected to the sort

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15. "Just what constitutes a race is a hard question to answer, since one's classification usually depends on the purpose of classification." Thus a group of scientists after developing a list of "racial types" emphasized that the list "of 30 'races' might have been ten or 50; the line of discrimination in many cases is arbitrary. . . . If this list does nothing else, we hope that it will bring home to the student the realization that race is not a static thing at all. . . ." *Ortiz*, 547 F. Supp. at 565 [citations omitted]. *See Cubas v. Rapid American Corp.*, 420 F.Supp. 663, 666 n.2 (E.D.Pa. 1976); *compare Anoaya v. Hilton Hotels Corporation*, 733 F.2d 48 (7th Cir. 1984) (absent allegation of racial animus, national origin discrimination not cognizable under Section 1981); *Budinsky v. Corning Glass Works*, 425 F.Supp. 786, 788-89 (W.D.Pa. 1977)

of prejudice that Section 1981 would redress as being impermissibly racially-based.[16] However, where a plaintiff comes into federal court and claims that he has been discriminated against because of his race, we will not force him first to prove his pedigree. We are unwilling to assert that Arabs cannot be the victims of racial prejudice: "prejudice is as irrational as is the selection of groups against whom it is directed. It is thus a matter of practice or attitude in the community, it is a usage or image based on all the mistaken concepts of 'race.'" *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979).[17]

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16. Appellant has appealed certain of the district court's discovery rulings. On remand, the District Court should reconsider those rulings in light of this court's recent decision in *Equal Employment Opportunity Commission v. Franklin and Marshall College*, 775 F.2d 110 (3d Cir. 1985).

17. Other courts have allowed "non-traditional" Section 1981 plaintiffs to raise claims of race discrimination. *See, e.g., Gonzalez v. Stanford Applied Engineering*, 597 F.2d 1298 (9th Cir. 1979) (plaintiff of Mexican descent having skin color "not characteristically Caucasian"); *Banker v. Time Chemical, Inc.*, 579 F. Supp. 1183 (N.D. Ill. 1983) (East Indian); *Pollard v. City of Hartford*, 539 F. Supp. 1156 (D.C. Conn. 1982) (Hispanic); *Baruah v. Young*, 536 F. Supp. 356 (D.M.D. 1982) (Native of India having skin color not characteristically white); *Aponte v. National Steel Service Center*, 500 F. Supp. 198 (N.D. Ill. 1980) (Mexican-American); *Tayyari v. New Mexico State University*, 495 F.Supp. 1365 (D.N.M. 1980) (Iranian); *Khawaja v. Wyatt*, 494 F.Supp. 302 (W.D.N.Y. 1980) (Pakastani-American); *Lopez v. Sears, Roebuck & Co.*, 493 F. Supp. 801 (D. M.D. 1980) (non-white (brown) Spanish surnamed Malay); *Ridgeway v. Inter. Broth. of Elec. Wkrs.* 466 F. Supp. 595 (N.D. Ill. 1979) (Hispanic); *Cubas v. Rapid American Corp.*, 420 F.Supp. 663 (E.D.Pa 1976) (Cuban-American); *Miranda v. Amalgamated Clothing Workers*, 8 CCH EPD ¶ 9601, BNA FEP Cases 557 (D. N.J. 1974) (Puerto Rican). *Compare Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D.Pa 1977) (plaintiff of Slavic national origin not able to state a cause of action for race discrimination); *Kurylas v. United States Dept. of Agriculture*, 373 F. Supp. 1072 (D.D.C. 1974) aff'd 514 F.2d 894 (D.C. Cir. 1975) (same-Polish American).

Accordingly, Al-Khazraji should be allowed the opportunity to prove that the discrimination he alleges is racially motivated within the meaning of Section 1981.

2. *Liability of the Individual Defendants Under Section 1981*

The district court found that the individual defendants, who are members of the tenure committee, are not the employers of plaintiff and so cannot be sued under Section 1981 or on the pendent state claims. We disagree. Although Section 1981 is a federal civil rights remedy it is in the nature of a tort remedy. *Goodman*, 777 F.2d at 119-20.

An individual, including a director, officer, or agent of a corporation, may be liable for injuries suffered by third parties because of his torts, regardless of whether he acted on his own account or on behalf of the corporation. "An officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefore." *Zubik v. Zubik*, 384 F.2d 267, 275-76 (3d Cir. 1967), *cert. denied* 390 U.S. 988 (1968). *See* Restatement (Second) of Agency § 343 (1957).

In particular, directors, officers, and employees of a corporation may become personally liable when they intentionally cause an infringement of rights protected by Section 1981, regardless of whether the corporation may also be held liable. *See Tillman v. Wheaton-Haven Recreation Association*, 517 F.2d 141, 1146 (4th Cir. 1975); *Faraca v. Clements*, 506 F.2d 956, 959 (5th Cir.), *cert. denied* 422 U.S. 1006 (1975); *See also Weaver v. Gross*, 605 F.Supp. 210, 212-13 (D.D. Col. 1985); *Gladden v. Barry*, 558 F.Supp. 676, 678 (D.D. Col. 1983); *Jeter v. Boswell*, 554 F. Supp. 946, 951-53 (N.D.W Va 1983).

If individuals are personally involved in the discrimination against the Appellant, and if they

intentionally caused the College to infringe on Appellant's Section 1981 rights, or if they authorized, directed, or participated in the alleged discriminatory conduct, they may be held liable. *See Manuel v. International Harvester Company*, 502 F.Supp. 45 (N.D. Ill. 1980); *Coley v. M & M Mars, Inc.*, 461 F. Supp. 1073 (M.D. Ga 1978); *see also Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236-37 (Section 1982 suit permitted against corporation and its directors).

D. *PENDENT STATE CLAIMS*

After dismissing Al-Khazraji's federal claims and thereby eliminating the basis for pendent jurisdiction, the District Court dismissed the pendent state claims. Because we are reinstating appellant's Section 1981 claim, upon remand the district court must reconsider the pendent state claims. When the district court dismissed the pendent claims, it expressed, in dictum, its views on the merits of the pendent claims.

The district court believed that, because the individual members of the Tenure Committee were not the appellant's employer, they could not be liable to appellant for breach of an employment contract, for intentional infliction of emotional distress, or for violations of the Pennsylvania Human Relations Act.

We agree that because the individual members of the tenure committee were not parties to any employment contract between Al-Khazraji and St. Francis College, they may not be sued on the contract for breach. However, Al-Khazraji has not alleged breach of contract against these individuals.[18]

However, we do not agree that the individual defendants, merely because they were not Al-Khazraji's employer, cannot under any circumstances be liable for

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18. Appellant's Amended Complaint, Count III par. 49.

intentional infliction of emotional distress. This tort does not require contractual privity. *See Bruffett v. Warner Communications, Inc.*, 692 F.2d 910, 914 (3d Cir. 1982).[19] Our understanding of the Pennsylvania Human Relations Act leads us to the same conclusion regarding it. *See* 43 P.C.S.A. §§ 955(e), 962(c).

V.

The judgment of the district court will be reversed and the case remanded for proceedings consistent with this opinion.

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19. Upon remand, the parties may want to consider whether this count is time-barred, an issue on which we express no opinion. *See Bruffett*, 692 F.2d at 914.

ADAMS, J., *concurring*.

As a matter of social policy, I have no dispute with the panel's position: I wholeheartedly favor laws prohibiting all types of invidious discrimination. As a matter of legislative interpretation, however, I question the panel's conclusion in Part III(c)(1) that Congress, in enacting § 1981, intended that a plaintiff would be able to establish a claim based on anti-Iraqui or anti-Arab discrimination. I join in the panel's holding nonetheless because I believe it is a not-unreasonable alternative given the Supreme Court's interpretation of § 1981. I disagree with that interpretation, however, and I also have strong reservations about the implications of this decision, which in large part would seem to follow from the Supreme Court's construction.

Enacted in the aftermath of the Civil War, which was fought to a great extent over slavery, § 1981 was intended to place blacks on an equal footing with whites by prohibiting racial discrimination in private contracts. *See Jones v. Alfred H. Mayer Company*, 392 U.S. 409, 427-28 (1968). Based on my reading of the statute, its legislative history, and the broader historical context in which it was enacted, I am persuaded that Congress designed its protections to apply solely to blacks. Admittedly there may have been one or two Congressmen like Senator Shellabarger, who wished to go further. But nothing in the legislative history indicates that such a stance represented the view of the majority in Congress.

An interpretation of § 1981 that would confine its coverage to blacks charging racial prejudice, however, would now seem to be precluded by *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273 (1976). There, the Supreme Court held that white plaintiffs seeking to challenge so-called reverse discrimination could maintain suit under § 1981.

Rejecting the position that the Act was designed solely to protect blacks, the Court declared that the 39th Congress "was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves." *Id.* at 295. The prospect of discrimination against whites may have appeared highly unlikely at the time, the Supreme Court stated, yet the statute created a principle that prohibited such unequal treatment: "the Act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *Id.* at 295.

McDonald does not directly control the case at hand, to be sure. It simply holds that § 1981 was intended to protect not only blacks but also members of other "races," and that white plaintiffs may therefore bring suit under it. The present case could be distinguished. Here, it might be argued, the plaintiff, although a Caucasian, does not claim to be discriminated against as a Caucasian, as in *McDonald*; rather, he alleges that he was discriminated against as an Arab or an Iraqui. And discrimination against Arabs or Iraquis, the argument would conclude, is not *racial* discrimination cognizable under § 1981.

The problem with this position is that it rests on a technical definition of race as black and white, or perhaps black, white and yellow, in keeping with the classic anthropological definition of race as the three major groups, Caucasoid, Negroid and Mongoloid. I agree with the panel that there is no evidence that Congress intended a narrow scientific definition of race when it passed § 1981. Moreover, adopting an anthropological definition would lead to anomalous results: while a white would be able to claim anti-white discrimination under the statute, for example, a

Mexican-American or an Indian would be unable to make out a claim, unless they contended they were unfairly treated by virtue of being Caucasians.

Having rejected a narrow definition of race, the majority comes forward with a much broader one. Race, it concludes, means "membership in a group that is ethnically and physiognomically distinctive." Ante at ___. I do not believe the Court should be conducting this definitional exercise to begin with, because in my view the statute was designed solely to protect blacks. But since *McDonald* appears to have removed that option, and of necessity forces a selection of some definition of race, the one selected by the majority seems more sensible than the anthropological approach.

Yet it too leads to troubling results. Now, in any suit under § 1981, a jury may be asked to determine whether the plaintiff has been subjected to discrimination as a result of belonging to a group that is "ethnically and physiognomically distinctive" -- a rather far cry from the language of, and the purpose behind, § 1981. Although the panel stops short of holding that national origin discrimination is encompassed by § 1981, virtually any nationality can be seen as ethnically and physiognomically distinctive. The result, I believe, constitutes a dramatic expansion in the number of plaintiffs who may now proceed under the statute, well beyond what Congress intended when it passed the law.[1] In effect, a statute aimed at

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1. In light of the continual flow of immigrants to the United States, the consequences of this expansion are quite substantial. Persons from most of the Middle East and Asia, for example, would now appear able to sue under § 1981. As of 1980, there were 2,539,800 persons born in Asia living in the United States, as well as 43,400 from Egypt and 71,500 from North Africa. United States Department of Commerce, Bureau of Census, *Statistical Abstract of the United States* (1985), at

racial discrimination is being converted into one also focused on national origin discrimination.

I agree that prohibiting private discrimination based on national origin, as Title VII expressly does, is salutary: indeed, prohibiting any type of invidious discrimination is salutary. I also realize that it may be tempting for federal judges to "interpret" the statute to achieve the desired result. Because we are not directly answerable to the voters, however, we are not well suited to make what is essentially a policy choice. That task, under our system of government, is assigned to Congress, the branch of government that is most representative of the people. And the more judges succumb to the temptation to make such policy choices under the guise of interpretation, the more we risk diminishing confidence in our judgments. In light of the Supreme Court's decision in *McDonald*, however, I am constrained to join the result reached by the panel.

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87. I do not mean to suggest that this inflow is in any way undesirable; the figures, rather, point up the extent of the expansion of the statute, which underpins, I believe, the need for Congress, as opposed to the judiciary, to decide on the appropriateness of this result.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,	)	
Plaintiff	)	
v.	)	Civil Action No. 80-1550
SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, Individually and in their official capacities,	)	
Defendants	)	

MEMORANDUM OPINION

Three complaints have been filed on behalf of plaintiff at the above-captioned civil action number. As a result of prior rulings by the Court, the operative complaint is the second complaint labeled "Amended Complaint." This complaint was filed by prior counsel

for plaintiff on November 7, 1980 against defendants, Saint Francis College, and nine members of its faculty and administration, individually and in their official capacities. This Amended Complaint is in three counts. Count I charges a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. Count II charges a violation of 42 U.S.C. § 1985(3) and 1986. While Paragraph 2 of the Amended Complaint states that this action arises under 42 U.S.C. §§ 1981, 1983, 1985(3), and 2000e, Count II in the Claims for Relief portion of the Amended Complaint restricts itself to 42 U.S.C. §§ 1985(3) and 1986. Count III raises certain state claims, which are alleged to be pendent to the federal claims.

Also as a result of prior orders of Court by Judge Ziegler in response to motions by defendants, which motions in

effect were motions to dismiss, the only remaining claims of plaintiff are those predicated on 42 U.S.C. §§ 1981 and 1983, and the pendent state claims.

On November 28, 1984, counsel for defendants filed a Motion for Summary Judgment.

42 U.S.C. § 1981 Claim

Proof of intent and purposeful discrimination are necessary elements of a § 1981 claim. Croker v. Boeing Company, 662 F.2d 975 (3d Cir. 1981).

During the academic year at issue, Academic Year 1977-1978, no other person in the Department of Behavioral Science was recommended for tenure by the Committee on Tenure or granted tenure by the Board of Trustees, no other person in the Department was recommended for, and granted, tenure until Academic Year 1979-1980 (two years after the tenure decision as to plaintiff), that person was Emilie

Allan, the wife of plaintiff Majid Ghaidan Al-Khazraji, also known as Majid Al-Khazraji Allan, and no other person in the Department who was a sociologist, the field of expertise of plaintiff, Dr. Al-Khazraji Allan, has since that time applied for, been recommended for, or been granted tenure.

Additionally, plaintiff does not qualify as a member of a protected minority under § 1981. Section 1981 is generally considered to apply only to racial and alienage discrimination, 3 A. Larson, Employment Discrimination, § 71.00 et seq.; 4 A. Larson, Employment Discrimination, § 94.00 et seq. The Amended Complaint alleges discrimination on the basis of national origin and religion, and not on the basis of race or alienage. Accordingly, the alleged acts of discrimination here are not within the scope of 42 U.S.C. § 1981.

Even if the Amended Complaint were to be read as making a racial claim under § 1981, plaintiff factually does not qualify as a protected minority member. At his deposition plaintiff stated:

> Q. Are you also taking the position that you were denied tenure because of your race?
>
> A. Yes.
>
> Q. What is your race?
>
> A. Caucasian but I was a different branch of the Caucasian race than you are. I am Caucasian but a different branch. I am claiming the national origin which is closer related to race and religion.

Plaintiff is claiming that he was discriminated against because of his national origin, Iraq, his ancestry, Arabian, and his religious creed, Muslim. A claim of discrimination on the basis of being an Iraqi or Arab is not cognizable under § 1981. Ibrahim v. New

York State Department of Health, 581 F. Supp. 228 (E.D.N.Y. 1984).

Accordingly, we must conclude that plaintiff is unable to establish a prima facie § 1981 case.

42 U.S.C. § 1983 Claim

As to the alleged violation of 42 U.S.C. § 1983, it is essential that the plaintiff allege and prove that the defendants acted under the color of state law. Saint Francis College is a private college. See Pendrell v. Chatham College, 370 F. Supp. 494 (W.D.Pa. 1974); Brownley v. Gettysburg College, 338 F. Supp. 725 (M.D.Pa. 1972). It is neither state owned nor state related. See Benner v. Oswald, 592 F.2d 174 (3d Cir. 1979) (Penn State); Braden v. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977). The affidavit of Richard Crawford, Assistant to the President, attached to the Motion for Summary

Judgment states that no action(s) taken by Saint Francis College relative to plaintiff was taken under the color of state law, that Saint Francis College is a private college, and that it is neither state owned nor state related. Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764 (1982), held, inter alia, that receipt of public funds does not make an employment decision of a school a decision of the state. Therefore, no facts are stated in the record warranting a possible conclusion that the alleged acts here could be considered to be under color of state law. Accordingly, the § 1983 claim must be dismissed, a result plaintiff concedes in his brief relative to the motion here.

Since there is redress available in the state system for any action of defendants, there is no federal claim under 42 U.S.C. § 1983. See Cohen v.

City of Philadelphia, 736 F.2d 81 (3d Cir. 1984).

Furthermore, since the individual defendants are not the employer, they are not within any theory of liability in contract or under the Pennsylvania Human Relations Act or for intentional infliction of emotional distress. It should be noted that the function of the Tenure Committee, and its members in voting, under the Guidelines for Tenure, is to make recommendations, and the Committee and its members do not have decision-making capacity and authority. The Tenure Committee, and its members in voting, under the Guidelines for Tenure, are to render a qualitative judgment, which judgment here, as manifested in the vote of the Committee, was negative. The authority and power of the Board of Trustees, under the governing College documents, including the Guidelines for

Tenure, was exercised to deny and withhold tenure. Thus, the individual defendants lack capacity to be sued and authority to be sued in either an individual or a representative or an official capacity, inasmuch, as previously stated, their function in the tenure process is merely to make a recommendation and they do not have decision-making capacity and/or authority. Furthermore, the Tenure Committee is not a legal entity or an entity subject to suit, and lacks capacity to be sued and authority to be sued, since the function of the Tenure Committee in the tenure process, under the Guidelines for Tenure, is merely to make a recommendation and it does not have decision-making capacity and/or authority. In view of the limited, non-decision-making role of the individual defendants in the tenure process, they

are thus not subject to liability under any of the theories propounded by plaintiff.

Likewise, we are of the view that plaintiff's claims relative to intentional infliction of emotional distress and breach of contract are without merit or legal support.

Finally, once the federal claims under §§ 1981 and 1983 are dismissed, there are no federal claims left to which any state claims can be pendent and all are subject to dismissal.

An appropriate order will be filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,	)	
Plaintiff	)	
v.	)	Civil Action No. 80-1550
SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, Individually and in their official capacities,	)	
Defendants	)	

O R D E R

AND NOW, this 12th day of March, 1985, upon consideration of Defendants' Motion for Summary Judgment and briefs relevant thereto, and being of the view that there exist no genuine issues of material fact,

IT IS ORDERED that:

(1) Defendants' Motion for Summary Judgment is GRANTED;

(2) Judgment is entered in favor of the Defendants, Saint Francis College, John Willoughby, Gervase Cain, Kirk Weixel, John Coleman, Rodrique Labrie, Albert Zanzuccki, Adrian Baylock, Marian Kirsch and David McMahon, and against the Plaintiff, Majid Ghaidan Al-Khazraji, also known as Majid Al-Khazraji Allan.

s/ Glenn E. Mencer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,	)	
Plaintiff	)	
v.	)	Civil Action No. 80-1550
SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, Individually and in their official capacities,	)	
Defendants	)	

O P I N I O N

Ziegler, District Judge

I. History of Case

Majid Ghaidan Al-Khazraji, Ph.D., was employed for nearly six years as an associate professor in the Department of Behavioral Science at Saint Francis College, at Loretto, Pennsylvania. Al-

Khazraji is a United States citizen of Iraqui national origin, and a member of the Muslim faith. He received two advanced degrees in this country: a masters degree from Cornell University and a doctorate from the University of Wisconsin.

On February 10, 1978, the tenure committee of Saint Francis College completed its deliberations and voted to deny tenure to plaintiff. The Board of Trustees ratified the recommendation on February 23, 1978. Plaintiff appealed this decision within the institution, but the tenure committee voted against reconsideration of plaintiff's application.

On March 20, 1978, Al-Khazraji received a one-year written contract from the college for the 1978-79 academic year. This contract specifically stated that plaintiff's appointment as a full-

time faculty member would not be renewed at the conclusion of that academic year. Plaintiff completed the contract, and was officially severed from the faculty on March 20, 1979.

In October of 1980, plaintiff filed a pro se complaint against St. Francis College and the individual trustees. He initially alleged that defendants had engaged in employment discrimination in violation of Title VII of the Civil Rights Act of 1964.[1] Subsequently, plaintiff secured counsel and filed amended complaints which additionally alleged violations of 42 U.S.C. §§ 1981, 1983, 1985(3), 1986, as well as violations of the Pennsylvania Human Relations Act, 43 P.S. § 951 et seq. The thrust of all these claims is that defendants denied tenure to plaintiff due

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[1] 42 U.S.C. § 2000(e) et seq, as amended.

to his national origin (Iraqui), religion (Muslim) or race (Arabian), in violation of federal law and the United States Constitution.

Defendants responded with a bevy of motions aimed at dismissing and striking the various claims brought by plaintiff.[2] By order dated February 9, 1981, this court dismissed plaintiff's claim under 42 U.S.C. § 1986 as untimely, but denied the remaining motions.[3]

Defendants now urge this court to reconsider its order of January 9, 1981, and dismiss the claims founded on Title VII, 42 U.S.C. §§ 1981, 1983, 1985(3) and the Pennsylvania Human Relations Act.

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[2]No brief accompanied defendants' original motions.

[3]This court also dismissed the allegations predicated on Title VII in plaintiff's second and third complaints as untimely. However, we left intact plaintiff's Title VII claim as it appears in his original complaint.

The issues now have been fully briefed by the parties and, for the following reasons, the motion of defendants to reconsider will be granted in part and denied in part.

II. Title VII Claims

Defendants first urge that plaintiff's claims under Title VII of the Civil Rights Act of 1964 should be dismissed in their entirety, as being untimely. Defendants take the position that any alleged discrimination occurred on February 10, 1978, when the tenure committee recommended that tenure be denied. Defendants argue that plaintiff had 180 days from that date to file a complaint with the EEOC, which he failed to do. Plaintiff rejoins, however, that the 180-day limitation period embodied in Title VII commenced on March 20, 1979, when he exausted his internal appeals and was officially discharged. For the

following reasons, we are compelled to conclude that plaintiff's Title VII claim is untimely.

Title VII of the Civil Rights Act of 1964 requires that aggrieved persons file a complaint with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred . . ." 42 U.S.C. § 2000 e-5(e). This limitation period, while guarantying the protection of the civil rights laws to those who promptly assert their rights, also protects employers from the burden of defending claims arising from employment decisions that are dated. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-464 (1975).

In a case strikingly similar to the one at bench, the Supreme Court recently held that the limitation period commences--for a college professor who believes that he has been discharged in

violation of Title VII--at the time the adverse tenure decision is made and communicated to him. Delaware State College v. Ricks, _____ U.S. _____ (1980). There the Board of Trustees of Delaware State College formally voted to deny Professor Ricks tenure on March 13, 1974. Ricks was offered a "terminal" contract to teach one additional year, after which time his employment relationship would end. Ricks executed the contract, and initiated grievance procedures within the college. On September 12, 1974, the Board notified Ricks that his grievance had been denied. On April 4, 1975, the plaintiff filed a complaint with the EEOC.

The Supreme Court held that the claim was untimely because Ricks had not filed the charge within 180 days of the date the college initially determined to deny him tenure, namely, March 13, 1974. The

Court rejected the contention that the statute of limitations began to run after the one-year "terminal" contract expired, or when the plaintiff exhausted the internal grievance procedures of the college. The Court concluded that "the only alleged discrimination occurred--and the filing limitations periods therefore commenced--at the time the tenure decision was made and communicated to Ricks. That is so even though one of the effects of the denial of tenure--the eventual loss of a teaching position--did not occur until later." _____ U.S. at _____.

Likewise, in the instant case, we are bound to conclude that the statute of limitations began to run, for purposes of filing the Title VII action, at the time St. Francis College made its official decision to deny tenure and communicated that decision to Al-Khazraji, namely, on

February 10, 1978.[4] This follows although plaintiff accepted a "terminal" contract for an additional year, and notwithstanding the institution of grievance procedures within the institution.

The Supreme Court's holding in Ricks compels the finding that, once the tenure committee voted to deny plaintiff tenure on February 10, 1978, the alleged discriminatory act was a fait accompli. Plaintiff then had 180 days to file a complaint with the EEOC.[5] Because he failed to comply with the statutory time period, plaintiff's claim under Title VII must be dismissed.

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[4]Or, at the very latest, on February 23, 1978, when the Board of Trustees ratified the decision of the tenure committee.

[5]Even if the 300-day period is applicable, plaintiff's suit is untimely.

III. Section 1985(3) Claims

We further find that Al-Khazraji has failed to state a claim under 42 U.S.C. § 1985(3). Plaintiff, in Count II of his second complaint, alleges that defendants conspired to violate rights secured by Title VII of the Civil Rights Act of 1964, as well as the Pennsylvania Human Relations Act.[6] He alleges that the conspiracy gives rise to a cause of action under 42 U.S.C. § 1985(3). We disagree.

The Supreme Court has specifically ruled that § 1985(3) creates no substantive rights by itself. Rather, it is a remedial statute, providing a civil cause of action when some otherwise defined federal right is breached by a conspiracy in the manner defined by that section. Great American Federal Savings

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[6] 43 P.S. § 951 et seq.

& Loan Association v. Novotny, 442 U.S. 366, 376 (1979). There the Court held that Title VII provides no basis for a 1985(3) action, because to allow such a detour would authorize an avoidance of most if not all of the detailed and spcific provisions of Title VII:

> [W]e conclude that § 1985(c) may not be invoked to redress violations of Title VII . . . Unimpaired effectiveness can be given to the plan put together by Congress in Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(c).
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> 442 U.S. at 378.

Al-Khazraji, having failed to meet the statutory filing requirements of Title VII, may not salvage his claim by submersion within the provisions of 42 U.S.C. § 1985(c). Nor may a state statute, such as the Pennsylvania Human Relations Act, serve as a predicate for a

cause of action under § 1985(3) since the latter was meant to provide redress for violations of federal rights. See Novotny, supra, 442 U.S. at 376. As a result, plaintiff has failed to state a cause of action under 42 U.S.C. § 1985(3), and that claim must be dismissed.

IV. Claims Under Sections 1981 and 1983

Defendants next contend that plaintiff's claims under 42 U.S.C. § 1981 and § 1983 are time-barred by the relevant statute of limitations. We disagree.

The Civil Rights Act of 1866, 42 U.S.C. § 1981 et seq., contains no specific statute of limitations. Federal courts, in adjudicating civil rights suits under the Act, are therefore bound to apply the period of limitations that governs the most nearly analogous state law claim. Johnson v. Railway Express

Agency, 421 U.S. 454 (1975); Liotta v. National Forge Co., 629 F.2d 903 (3d Cir. 1980).

Courts within the Third Circuit have, in countless cases, considered the question of the applicable statute of limitations in federal civil rights suits in which a plaintiff alleges racial discrimination in employment. At least to date, these courts have uniformly concluded that such actions are governed by the 6-year period of limitations set forth in 12 P.S. § 31.

The leading case is Davis v. United States Steel Supply, Inc., 581 F.2d 335 (3d Cir. 1978). There the plaintiff brought suit under 42 U.S.C. § 1981, alleging racially discriminatory employment practices. Specifically, Davis alleged harrassment by her fellow employees due to race, which ultimately led to her discharge when she persisted

in complaining to her supervisor.

The Court of Appeals considered with care the question of the applicable period of limitations under Pennsylvania law. The Court likened the claim to a cause of action for "an unlawful breach of an existing at-will employment contract," or to "those torts which involve the wrongful interference with another's economic rights or interests." 581 F.2d at 339. It therefore concluded that Ms. Davis' claim fit within the broad 6-year limitations period set forth in 12 P.S. § 31.[7] The Davis court specifically rejected the argument that the type of employment discrimination alleged was subject to the 2-year period

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[7]See also Skehan v. Bd. of Trustees of Bloomsburg State Col., 590 F.2d 470, 477 (3d Cir. 1978), where the court likened a professor's claim for discriminatory discharge to "the state law claim of wrongful interference with a contact," and applied the 6-year statute of limitations of 12 P.S. § 31.

of limitations posited in 12 P.S. § 34. That provision, said the court, was limited to actions in which damages were sought for bodily injury. 581 F.2d at 339.

In the instant case, Davis would be dispositive except for the change in Pennsylvania law. Effective June 27, 1978, the General Assembly repealed 12 P.S. § 31 et seq., and enacted a new and more complex statute of limitations. See 42 Pa.C.S.A. § 5521 et seq.[8] Defendant contends that Al-Khazraji's claim is no longer governed by the 6-year limitations period, but rather by one of the following provisions: the 1-year limitation contained in 42 Pa.C.S.A. § 5523, the 2-year limitation contained in 42 Pa.C.S.A. § 5524, or the 90-day limitation period embodied in the

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[8]Act of 1976, July 9, P.L. 586, No. 142, generally effective June 27, 1978.

Pennsylvania Human Relations Act, 43 P.S. § 959. If any of these enactments are apposite, plaintiff's actions under 42 U.S.C. §§ 1981 and 1983 are untimely, because plaintiff did not raise these claims until November 7, 1980, nearly three years after the cause of action allegedly arose.

We are not persuaded however, by defendants' argument. None of these provisions are even vaguely analogous to an allegation of racial discrimination in terminating an employment contract. The 1-year statute of limitations contained in 42 Pa.C.S.A. § 5523 applies to actions for libel, slander, invasion of privacy, and to certain actions on bonds. The 2-year period of limitations found in 42 Pa.C.S.A. § 5524 applies primarily to actions for injury to the person or property. They hardly provide an analogue to a claim for discriminatory

termination of a college professor's employment contract.[9]

The sole question that remains is whether the applicable statute of limitations is the 4-year period contained in 42 Pa.C.S.A. § 5525, or the 6-year period contained in 42 Pa.C.S.A. § 5526. Both provisions in some way relate to actions for breach of contract, and both are arguably analogous to the sort of action at bench.

42 Pa.C.S.A. § 5526, which contains a 4-year statute of limitations, applies to various contracts for sale, oral contracts, and contracts implied in law. As indicated in the Official Source Note to this section, it is patterned after the statute of limit ons contained in the Pennsylvania Uniform Commercial Code,

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[9]As for the Pennsylvania Human Relations Act, we find it to be wholly inapposite.

which provides for a 4-year period of limitations in contracts for sale. See 12A P.S. § 2-725. We fail to perceive any portion of § 5526 that may be anologized to an action for alleged racial discrimination in denying tenure to a college professor. We re-emphasize that such an action may be likened to an action for unlawful termination of a written employment contract or, alternatively, to an action for tortious interference with an employment contract. See Davis v. United States Steel Supply, Inc., supra, 581 F.2d at 339; Skehan v. Bd. of Trustees of Bloomsburg State Col., supra., 590 F.2d at 477. Section 5526 therefore deals with a narrow category of contracts which is inapplicable to the instant case.

On the other hand, 42 Pa.C.S.A. § 5527, which establishes a 6-year statute of limitations, is significantly

broader in scope. It applies to any "action upon a contract, obligation or liability founded upon a bond, note or other instrument in writing . . ." This provision would appear to encompass actions for unlawful termination of written contracts, which may be analogized to the case before us.[10]

Moreover, although the statute specifically mentions neither actions for unlawful termination of written employment contracts nor actions for tortious interference with employment contracts, it is crucial to note that § 5527 of the new Act contains a broad

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[10]As the Official Source Note to § 5527 indicates, this section is patterned in part after 12 P.S. § 31, which formerly provided a 6-year statute of limitations for breach of contract and tortious interference with contracts, and we note that in Pennsylvania the broad run of contract actions have fallen under a 6-year limitation period for over 250 years. See Act of March 27, 1713. (1 Sm.L. 76 § 1).

saving provision. It provides that the 6-year statute of limitations will govern any civil action "which is neither subject to another limitation specified in this sub-chapter nor excluded from the application of a period of limitation by § 5531 (relating to no limitation.)" 42 Pa.C.S.A. § 5527(6). Thus, even if an action for discriminatory termination of a written employment contract did not fall squarely within the language of § 5527(2), relating to written contracts, it would be governed by the saving clause of § 5527(6). In either case, the 6-year limitation period is applicable.[11]

Our conclusion that the 6-year

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[11] In a number of cases since the enactment of the new Pennsylvania statute, courts have continued to apply a 6-year limitation period in similar civil rights suits, albeit under the old statute. See Liotta v. National Forge Co., 629 F.2d 903, 906 (3d Cir. 1980); Skrock v. Caltabiano, 505 F.Supp. 916, 920 (E.D.Pa. 1981).

statute of limitations should continue to apply is fortified by our belief that continuity in such procedural matters is crucial. If individuals are to be guaranteed a realistic ability to pursue federal civil rights actions, the limitations period for such actions should not lightly be changed. Citizens who turn to the courts to vindicate their civil rights, it must be remembered, are rarely trained in the niceties of Pennsylvania jurisprudence. And it is unwise for federal courts to limit the period of limitations, under the Civil Rights Act, absent a clear and specific change in state law mandating the dimunition.[12] We are satisfied that no such change has occurred in Pennsylvania

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[12]This is not to dispute that, sometime in the future, Pennsylvania case-law could effectuate a clear and specific change in the relevant period of limitations.

law with respect to the claim before us today.

V. Miscellaneous Contentions

The remainder of the contentions raised by defendants are without merit, and require brief comment only. Defendants assert that Al-Khazraji's claim under 42 U.S.C. § 1983 should be dismissed because plaintiff has failed to demonstrate state action.

This issue is controlled by Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961). The question is whether the Commonwealth of Pennsylvania, in the language of Mr. Justice Clark, "has so far insinuated itself into a position of interdependence" with St. Francis College that it must be recognized as a joint participant in the alleged discriminatory activity. Plaintiff has at least raised a factual issue in this regard, because he has alleged that St. Francis College

"has received financial aid from the United States of America and the Commonwealth of Pennsylvania." See plaintiff's second complaint filed Nov. 7, 1980, at p. 2. Although this broad allegation is hardly dispositive of the issue, federal courts have been reluctant to dismiss civil rights actions for want of state action unless the facts have been fully explored. As the Court of Appeals has stated:

> It would perhaps be possible for us to decide this last issue (relating to state action) on the present record but we think we should not do so. Very important constitutional questions are presented and the Supreme Court has repeatedly informed us that such difficult issues should not be decided except upon a full record and after adequate hearing.

Braden v. University of Pittsburgh, 477 F.2d 1, 4-5 (3d Cir. 1973); See also Weise v. Syracuse University, 522 F.2d

397 (3d Cir. 1975). We therefore conclude that it is premature to dispose of the state action issue at this juncture, until a complete record is established.

Next, defendants urge that plaintiff's claim under 42 U.S.C. § 1981 should be dismissed because it is based on national origin and not on racial grounds. A number of courts have admittedly held that discrimination based upon national origin or ancestry is not actionable under § 1981. See Saad v. International Secur. Services, Inc., 456 F.Supp. 33 (D.C.D.C. 1978) (alleged discrimination on account of Arabian national origin not actionable under § 1981). However, as one scholar has noted:

> 'Section 1981 was enacted to eradicate disparate treatment between the white majority and clearly identifiable minorties,'

> and there are many cases holding that victims of discrimination based upon national origin or ancestry can use § 1981 to vindicate the rights set forth in the Act.

ANTIEAU, FEDERAL CIVIL RIGHTS ACT, § 23 (1980), quoting Ridgeway v. International Brotherhood of Electrical Workers, 446 F.Supp. 595, 597 (N.D. Ill. 1979).

Moreover, we observe that the distinction between "race" and "national origin" is an elusive one, and frequently turns on semantics rather than significant differences. Although the exact word "race" may not appear in plaintiff's third complaint, which raised the claim under 42 U.S.C. § 1981, plaintiff's position from the outset has been that he was subject to disparate treatment because of "national origin, religion, and/or race."[13] We therefore

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[13] See plaintiff's original complaint at page 1 and second complaint at page 3.

decline to dismiss plaintiff's action under § 1981 simply because he omitted the word "race" in his third complaint. In our view, it is a technical defect of little significance. The thrust of plaintiff's claim, namely, that he was denied tenure by St. Francis College because he is an Arabian born in Iraq, is clear to all concerned, and may serve as the basis for a civil rights action under 42 U.S.C. § 1981.

As a final matter, defendants point to the fact that three different complaints have been filed on behalf of plaintiff in this action. The original complaint was filed pro se by plaintiff on October 30, 1980. The so-called first amended complaint was filed by plaintiff's attorney on November 7, 1980. The so-called second amendment was filed pro se by plaintiff on December 22, 1980. Defendants assert that because the

second amendment--which solely raised Title VII claims--was dismissed by the court as untimely, the preceding complaints should be dismissed or stricken.

We decline to adopt this harsh approach. First, we note that the second amendment was filed pro se by plaintiff and it would be unjust to allow this amendment, which was obviously designed as a mere addendum to the original complaint, to supersede and nullify the complaints that preceded it.

Secondly, we note that there is some uncertainty as to which amendment in fact came last. Although plaintiff's amendment was filed after that of his lawyer, plaintiff's amendment was mailed, and the cover letter is dated November 5, 1980. Thus it appears that plaintiff actually prepared and mailed his pro se amendment before his attorney filed the

so-called first amended complaint.

In view of these facts, we will treat the first amended complaint, prepared by plaintiff's counsel and filed November 7, 1980, as the operative amendment in the instant action.

An appropriate order will follow.

DATED: September 30,1981

s/ Donald E. Ziegler
Donald E. Ziegler
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,	)	
Plaintiff	)	
v.	)	Civil Action No. 80-1550
SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANOCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, Individually and in their official capacities,	)	
Defendants	)	

ORDER OF COURT

AND NOW, this 1st day of October, 1981,

IT IS ORDERED that the claims of plaintiff predicated on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq., be and hereby are dismissed for want of timeliness.

IT IS FURTHER ORDERED that the claims of plaintiff predicated on 42 U.S.C. § 1985(3) be and hereby are dismissed for failure to state a cause of action.

IT IS FURTHER ORDERED that the motions of defendants to dismiss the claims of plaintiff predicated on 42 U.S.C. §§ 1981 and 1983 shall and hereby are denied.

IT IS FURTHER ORDERED that defendants shall file an answer to the claims of plaintiff within 20 days.

s/ Donald E. Ziegler
Donald E. Ziegler
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,	)	
Plaintiff	)	
v.	)	Civil Action No. 80-1550
SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, Individually and in their official capacities,	)	
Defendants	)	

O R D E R

AND NOW, this 30th day of August, 1982, after careful consideration of submitted briefs, the plaintiff's Motion to Compel Discovery, filed July 2, 1982, is granted in part and

IT IS HEREBY ORDERED that the defendant, St. Francis College, produce

for the purposes of inspection and copying by plaintiff and his counsel all documents referencing plaintiff's involvement with or performance in the 'Tripoli project', and to answer Interrogatory No. 25 of the plaintiff's Interrogatories filed of record on April 14, 1982, and all other aspects of plaintiff's Motion to Compel Discovery is denied.

IT IS FURTHER ORDERED that Discovery is extended until October 1, 1982, and that plaintiff's Pretrial Narrative Statement shall be filed by October 21, 1982 and defendant's Pretrial Narrative Statement shall be filed by November 10, 1982.

s/ Glenn E. Mencer
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3205

MAJID GHAIDAN AL-KHAZRAJI,
a/k/a MAJID AL-KHAZRAJI ALLAN,

Appellant

vs.

SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRAIN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, individually and in their official capacities

(D.C. Civil No. 80-1550)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, GIBBONS, and STAPLETON, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel December 5, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 12, 1985, be, and the same is hereby reversed and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellees.

ATTEST:

s/ Sally Mrvos
Clerk

March 3, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3205

MAJID GHAIDAN AL-KHAZRAJI,
a/k/a MAJID AL-KHAZRAJI ALLAN,

Appellant

vs.

SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, individually and in their official capacities

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SUR PETITION FOR REHEARING

PRESENT: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, Circuit Judges

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available

circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

By the Court,

s/
Circuit Judge

DATED: APR 4, 1986